In the

Supreme Court of the United States

OCTOBER TERM, 1930

No._____(Original)

STATE OF ARIZONA,
Complainant,

vs.

STATE OF CALIFORNIA, STATE OF NEVADA, STATE OF UTAH, STATE OF NEW MEXICO, STATE OF COLORADO, STATE OF WYOMING, and RAY LYMAN WILBUR, Secretary of the Interior,
Defendants.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

The State of Arizona, appearing by its Attorney General, respectfully moves and prays the Court for leave to file its Bill of Complaint herewith submitted.

K. Berry Peterson,
Attorney General of the State of Arizona, Solicitor for Complainant.

Dean G. Acheson,
Clifton Mathews,
Of Counsel.

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Defendants.

BILL OF COMPLAINT.

The State of Arizona, appearing by its Attorney General, by leave of court files this its bill of complaint and respectfully alleges:

I

The State of Arizona, complainant herein, and the States of California, Nevada, Utah, New Mexico, Colorado and Wyoming, defendants herein, are States of the Union, duly admitted thereto and exercising equal sovereignty with the original and all other States of the

Union. Defendant Ray Lyman Wilbur is the Secretary of the Interior of the United States and is a citizen of the State of California.

II

The Colorado River rises in Colorado and flows in Colorado for a distance of 245 miles, thence in Utah for a distance of 285 miles, thence in Arizona for a distance of 292 miles, thence on the boundary between Arizona and Nevada for a distance of 145 miles, thence on the boundary between Arizona and California for a distance of 235 miles, thence on the boundary between Arizona and Mexico for a distance of 16 miles, thence in Mexico for a distance of 75 miles, and there enters the Gulf of California. Said river has a total length of 1,293 miles, of which 688 miles are in Arizona or on the boundary thereof. Lee Ferry is a point in the Colorado River 23 miles below the point where said river enters Arizona from Utah. Black Canyon is a point in said river 355 miles below Lee Ferry, and is in that part of said river which forms the boundary between Arizona and Nevada. Said river attains its greatest average annual flow at Black Canyon. Laguna Dam is a diversion dam in said river 276 miles below Black Canyon, and is in that part of said river which forms the boundary between Arizona and California. Said Laguna Dam is 13 miles above the City of Yuma and 18 miles above the point where said river becomes the boundary between Arizona and Mexico.

III

The principal tributaries of the Colorado River are the Gunnison River, which rises in Colorado and

flows in Colorado for a distance of 160 miles, and there enters the Colorado River; the Green River, which rises in Wyoming and flows in Wyoming for a distance of 246 miles, thence in Utah for a distance of 56 miles, thence in Colorado for a distance of 35 miles, thence in Utah for a distance of 272 miles, and there enters the Colorado River; the San Juan River, which rises in Colorado and flows in Colorado for a distance of 61 miles, thence in New Mexico for a distance of 110 miles, thence in Utah for a distance of 130 miles, and there enters the Colorado River; the Little Colorado River, which rises in Arizona and flows in Arizona for a distance of 268 miles, and there enters the Colorado River; the Virgin River, which rises in Utah and flows in Utah for a distance of 83 miles, thence in Arizona for a distance of 30 miles, thence in Nevada for a distance of 60 miles, and there enters the Colorado River; the Williams River, which rises in Arizona and flows in Arizona for a distance of 132 miles, and there enters the Colorado River; and the Gila River, which rises in New Mexico and flows in New Mexico for a distance of 115 miles, thence in Arizona for a distance of 406 miles, and there enters the Colorado River. The Gila River enters the Colorado River 10 miles below Laguna Dam, 286 miles below Black Canyon and 641 miles below Lee Ferry. The Williams River enters the Colorado River between Laguna Dam and Black Canyon. The Virgin River and the Little Colorado River enter the Colorado River between Black Canyon and Lee Ferry. All the other tributaries above mentioned enter the Colorado River above Lee Ferry. Said tributaries have a total combined length of 2,164 miles, of which 836 miles are in Arizona. No tributaries enter the Colorado River from California, nor does California contribute any appreciable quantity of water to said river.

IV

The drainage basin of the Colorado River in the United States has a total area of 240,000 square miles, of which 103,000 square miles are in Arizona, 4,000 square miles in California, 12,000 square miles in Nevada, 40,000 square miles in Utah, 23,000 square miles in New Mexico, 39,000 square miles in Colorado, and 19,000 square miles in Wyoming. Approximately 43 per cent. of the total area of said basin is in Arizona, and approximately 90 per cent. of the total area of Arizona is in said basin.

V

From the point where it enters Arizona to the point where it enters Mexico, the Colorado River has a fall of 3,230 feet, of which 2,200 feet occurs in Arizona, 650 feet on the boundary between Arizona and Nevada, 350 feet on the boundary between Arizona and California, and 30 feet on the boundary between Arizona and Mexico. That part of the Colorado River which flows in Arizona and on the boundary between Arizona and Nevada flows through an almost continuous series of deep canyons, the walls of which rise on each side of said river to a height varying from a few hundred feet to more than 5,000 feet, because of which said river in said canyon region is practically inaccessible. Throughout said canyon region there are numerous rapids, cataracts and other natural obstructions, because of which, and because of the great fall and rapid flow of said river, navigation thereof in Arizona and on the boundary between Arizona and Nevada has always been and is now utterly impossible.

VI

That part of the Colorado River which flows on the boundary between Arizona and California and between Arizona and Mexico flows between comparatively low banks, is therefore easily accessible, and is comparatively free from rapids and cataracts, but is obstructed by numerous sand-bars and is too shallow to permit of navigation. Said river carries great quantities of silt, which are constantly being deposited within and upon the bed thereof, and which, while so carried and after being so deposited, constitute a further obstacle to the navigation of said river. Another obstacle to the navigation of said river has resulted from the construction of said Laguna Dam by the Government of the United States, and the diversion of great quantities of water from said river for irrigation and other purposes. Because of said conditions, said river has never been, and is not now, a navigable river.

VII

The total average flow of the Colorado River and its tributaries in the United States is 18,000,000 acre-feet of water annually. Of said total flow, 9,000,000 acre-feet were appropriated and put to beneficial use in the United States prior to June 25, 1929, and said appropriated water has ever since been and is now being used and consumed. Of said appropriated water, 2,500,000 acre-feet are diverted annually from the Colorado River above Lee Ferry and from tributaries entering said river above Lee Ferry, and are used and consumed in Utah, New Mexico, Colorado and Wyoming, and 6,500,000 acre-feet are diverted annually from said river below Lee Ferry and from tributaries entering said river below Lee Ferry, and are used and consumed in Arizona, California, Ne-

vada and New Mexico. Of the appropriated water so diverted below Lee Ferry, 3,500,000 acre-feet are annually diverted, used and consumed in Arizona. Of the appropriated water so diverted, used and consumed in Arizona, 2,900,000 acre-feet are diverted from the Gila River and its tributaries. Of the total flow of the Colorado River and its tributaries in the United States, 9,000,000 acre-feet were on June 25, 1929, ever since have been, and are now wholly unappropriated. All of said unappropriated water flows in Arizona and on the boundary thereof; all of it is needed and can be put to beneficial use in Arizona; and all of it is subject to appropriation under the laws of Arizona. Of said unappropriated water, 8,000,000 acre-feet are flowing in the main stream of the Colorado River, and 1,000,000 acre-feet in tributaries entering said river between Lee Ferry and Laguna Dam. All of the water of the Gila River and its tributaries was appropriated and put to beneficial use in Arizona and New Mexico prior to June 25, 1929. There was not on said date, nor has there since been, nor is there now, any unappropriated water in the Gila River or any of its tributaries. To "appropriate" water means to take and divert a specified quantity thereof and put it to beneficial use in accordance with the laws of the State where such water is found, and, by so doing, to acquire, under said laws, a vested right to take and divert from the same source, and to use and consume, the same quantity of water annually forever, subject only to the rights of prior appropriators. Such is the sense in which the word "appropriate" and its derivatives are used in this bill of complaint.

VIII

All land in the drainage basin of the Colorado River is arid in character. In those parts of said basin

which are susceptible of irrigation, the average annual rainfall is as follows: In Arizona and California, less than 5 inches; in Nevada, 6 inches; in Wyoming, 7 inches; in Utah and New Mexico, 8 inches; in Colorado, 10 inches. Throughout said basin, in order to grow crops of any kind successfully, irrigation is necessary. Because of differences in soil, climate, rainfall, length of growing season, and other conditions, the quantity of water required per acre varies in different parts of said basin. The average quantity of water per acre required annually for the purpose of irrigation is as follows: In Arizona and California, 4.5 acre-feet; in Nevada, 3 acre-feet; in Utah, New Mexico, Colorado and Wyoming, 1.5 acre-feet.

IX

Because of the arid character of its land, irrigation is of the utmost importance to the State of Arizona. During the past 20 years the population of said State has increased from 204,000 to 421,000, and the assessed valuation of taxable property in said State has increased from $83,769,000 to $714,945,000. A great part of said increase in population and wealth has resulted from the constantly increasing use of irrigation in said State, and the consequent development of its agricultural land. The present welfare and prosperity of said State are largely the result of irrigation, and its future growth and progress are largely dependent upon the reclamation and irrigation of additional land in said State. In addition to the land now being irrigated, there are more than 2,000,000 acres of land in said State which are not now irrigated, but are susceptible of irrigation from the unappropriated water of the Colorado River and its tributaries, and which cannot be irrigated by any other means or from

any other source. All of said land is extremely fertile and, when irrigated, will be extremely productive. More than 200,000 acres of said land are owned and held by the State of Arizona. The irrigation of said land will require all of the unappropriated water of the Colorado River and its tributaries, aggregating 9,000,000 acre-feet annually, as aforesaid. Said land, although at present uncultivated and practically uninhabited, will, when irrigated, be capable of supporting a population of more than 500,000, and the irrigation of said land will add greatly to the wealth and taxable resources of the State of Arizona, and to the health, happiness, prosperity and general welfare of its inhabitants. Because of the expense of constructing, maintaining and operating the dams, reservoirs, canals and other works required for the irrigation of said land, it will not be feasible to irrigate said land in small separate tracts, but it will be necessary to combine such tracts into large projects, each project being operated and administered as a single unit. The organization of such projects and the construction, maintenance and operation of such dams, reservoirs, canals and other works will require financing on a large scale, which will be impossible unless water for the irrigation of said land can be appropriated and vested rights to the permanent use thereof acquired at or prior to the time of constructing such works.

X

In that part of the Colorado River which flows in Arizona and on the boundary between Arizona and Nevada, there are numerous sites suitable for the construction, maintenance and operation of the dams and reservoirs required for the irrigation of the land referred to in paragraph IX hereof. One of said sites is at Black Canyon, on the boundary between Arizona and Nevada.

By utilizing said sites, it would be possible and economically feasible to store in reservoirs situated in Arizona, or partly in Arizona and partly in Nevada, all of the water of the Colorado River, and to make all of said water available for irrigation. Said dam sites and reservoir sites are also suitable for the construction, maintenance and operation of plants for the generation of electric power from the water to be stored in such reservoirs. All the water of the Colorado River flowing past said dam sites and reservoir sites, including both the unappropriated water and water appropriated for beneficial use below said sites, is subject to appropriation for the generation of electric power at said sites. By the use of such power plants and such stored water, great quantities of electric power could be generated and sold for use in Arizona and elsewhere. The business, and all property used in connection with the business, of generating and selling such power would be subject to taxation and would yield substantial revenues to the State of Arizona, and the use of such power would add greatly to the welfare and prosperity of said State and its inhabitants. For the reasons aforesaid, the water of the Colorado River and the dam sites and reservoir sites above referred to constitute the greatest natural resource of the State of Arizona.

XI

Irrigation projects already formed and now in existence comprise more than 1,000,000 acres of the unirrigated but irrigable land referred to in paragraph IX hereof. More than 100,000 acres of the land in said irrigation projects are owned and held by the State of Arizona. None of the land in said projects is now irrigated, but all of it is susceptible of irrigation. The irrigation of

said land is practicable and feasible at the present time, and definite plans have been made for the irrigation thereof. Such irrigation will require 4,500,000 acre-feet annually of the unappropriated water now flowing in the main stream of the Colorado River. Permits for the appropriation of said water have been granted by the State Water Commissioner of the State of Arizona. In order to appropriate and use said water for the irrigation of the land in said projects, it will be necessary to store said water by means of dams and reservoirs to be constructed and maintained in that part of the Colorado River which flows in Arizona and on the boundary between Arizona and Nevada, and to utilize for that purpose the dam sites and reservoir sites mentioned in paragraph X hereof. Said plans contemplate the construction and use of such dams and reservoirs for the storage of the water to be used in irrigating said lands. There have also been formed and are now in existence certain power projects, whose purpose is to utilize said dam sites and reservoir sites for the generation and sale of electric power. Definite plans have been made for carrying out said purpose. The generation of said power will require the construction, maintenance and operation of dams, reservoirs and power plants at said sites. Plans and specifications therefor have been submitted to and approved by the State Engineer of the State of Arizona. But for the passage of the Boulder Canyon Project Act hereinafter referred to, the work of constructing said dams and reservoirs for the irrigation of said lands and for the generation of said electric power would long since have commenced, and if said act shall be held unconstitutional, as hereinafter prayed, said work will be immediately commenced and prosecuted to completion. Numerous persons and corporations desire to engage in

the business of storing and selling water, and in the business of generating and selling electric power in Arizona, and to utilize said dam sites and reservoir sites, including the one at Black Canyon, for that purpose. Said businesses and the property used in connection therewith would be subject to taxation and would yield substantial revenues to the State of Arizona.

XII

The State of Arizona was admitted to the Union on February 14, 1912. Upon its admission to the Union, said State acquired, has ever since possessed and exercised, and now possesses and exercises, sovereign jurisdiction and control of all water within its boundaries, including the water of the Colorado River and its tributaries. The Constitution of the State of Arizona provides that the common law doctrine of riparian water rights shall not obtain or be of any force or effect in said State. Statutes of the State of Arizona, heretofore duly enacted and now in force, being sections 3280 to 3286, inclusive, of the Revised Code of 1928, and sections 1 and 3 of Chapter 102 of the Session Laws of 1929, regulate and control the storage, diversion, appropriation and use of water, and the construction, operation and maintenance of dams and reservoirs in said State. A copy of said statutes is appended hereto at page 43. Said statutes provide that all water flowing in streams or other natural channels belongs to the public and is subject to appropriation; that the person first appropriating water shall have the better right thereto; that any person intending to appropriate water shall apply to the State Water Commissioner for a permit to make such appropriation; that if such application is approved by said Commissioner, the applicant may appropriate such water and construct

such works as may be necessary for that purpose; that if such application is rejected, the applicant shall take no steps toward appropriating such water or constructing such works; that when any such application, or the proposed use of the water sought to be appropriated, is a menace to the safety or against the interests and welfare of the public, it shall be rejected; that all dams shall be under the jurisdiction of the State Engineer; and that it shall be unlawful to construct, operate or maintain any dam except upon the approval of said Engineer. Under and by virtue of said statutes, all of the unappropriated water of the Colorado River and its tributaries, aggregating 9,000,000 acre-feet annually, was on June 25, 1929, ever since has been, and is now, subject to appropriation in Arizona. Said water cannot, nor can any part thereof, be lawfully appropriated, stored, diverted, used or disposed of, except as provided in said statutes.

XIII

Legislation was enacted in the year 1921 by the legislatures of the States of Arizona, California, Nevada, Utah, New Mexico, Colorado and Wyoming and by the Congress of the United States, providing for the appointment of commissioners by the Governors of said States and by the President of the United States, and authorizing such commissioners to negotiate a compact for the equitable apportionment of the water of the Colorado River and its tributaries, and to submit such compact to the legislatures of said States and to the Congress of the United States. Such commissioners were appointed and did draft and submit to said legislatures and to Congress a proposed compact entitled and hereinafter referred to as the Colorado River Compact, a copy of which is appended hereto at page 50. Said compact provides that,

as used therein, the term "Colorado River System" means that portion of the Colorado River and its tributaries within the United States; that the term "Colorado River Basin" means all of the drainage area of said Colorado River System and all other territory within the United States to which the water of said system shall be beneficially applied; that the term "Upper Basin" means those parts of Arizona, Utah, New Mexico, Colorado, and Wyoming within and from which water naturally drains into said Colorado River System above Lee Ferry, and also all parts of said States located without said drainage area which are now or shall hereafter be beneficially served by water diverted from said system above Lee Ferry; that the term "Lower Basin" means those parts of Arizona, California, Nevada, Utah and New Mexico within and from which water naturally drains into said Colorado River System below Lee Ferry, and also all parts of said States located without said drainage area which are now or shall hereafter be beneficially served by water diverted from said system below Lee Ferry; that there is apportioned from said Colorado River System, in perpetuity, to said Upper Basin and to said Lower Basin, respectively, the exclusive, beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist; that if the United States shall recognize any right in Mexico to the use of any water of said system, such water shall be supplied from water unapportioned by said compact; that further equitable apportionment of the water of said system unapportioned by said compact may be made at any time after October 1, 1963; that inasmuch as the Colorado River has ceased to be navigable for commerce, and the reservation of its water for navigation would seriously

limit the development of its basin, the use of its water for purposes of navigation shall be subservient to the use of such water for domestic, agricultural and power purposes; and that said compact shall become binding and obligatory when it shall have been approved by the legislatures of all the signatory States (Arizona, California, Nevada, Utah, New Mexico, Colorado and Wyoming) and by the Congress of the United States.

XIV

Said Colorado River Compact is grossly inequitable, unjust and unfair to the State of Arizona, for the reasons and in the respects following, to-wit:

(1) Said compact attempts to apportion to said Upper Basin more, and to said Lower Basin less, than an equitable share of the water of said Colorado River System. Said compact attempts to apportion to each of said basins the same quantity of water, to-wit, 7,500,000 acre-feet annually, but said Lower Basin needs and can put to beneficial use more than twice the quantity of water which is needed or can be put to beneficial use in said Upper Basin. That part of said Lower Basin which is in Arizona needs and can put to beneficial use more than the total quantity of water which said compact attempts to apportion to said entire Lower Basin. Said Lower Basin includes practically all of Arizona. None of the water of said Colorado River System can be put to beneficial use in that part of Arizona which is in said Upper Basin. The 7,500,000 acre-feet of water which said compact attempts to apportion to each of said basins includes all water necessary to supply existing rights, which means all water heretofore appropriated and now being used. In said Lower Basin such appropriations amount to 6,500,000 acre-feet of water annually, whereas

in said Upper Basin they amount to only 2,500,000 acre-feet annually. Thus said compact attempts to apportion to said Lower Basin only 1,000,000 acre-feet of unappropriated water, whereas it attempts to apportion to said Upper Basin 5,000,000 acre-feet of unappropriated water annually. Under said compact, said 5,000,000 acre-feet of unappropriated water could not, nor could any part of it, be appropriated in said Lower Basin. Thus said compact attempts to deprive the State of Arizona, its citizens, inhabitants and property owners, of their right to appropriate said 5,000,000 acre-feet of unappropriated water, all of which is now subject to appropriation in Arizona.

(2) Said compact does not apportion or attempt to apportion all of the water of said Colorado River System, but attempts to apportion only 15,000,000 acre-feet thereof, and leaves unapportioned the remaining water of said system, aggregating 3,000,000 acre-feet annually. Said unapportioned water is a part of the unappropriated water of said Colorado River System. Said compact attempts to withdraw said unapportioned water from appropriation and to prohibit the appropriation thereof. This said compact attempts to do by providing that Mexican rights shall be supplied from said unapportioned water, and that said unapportioned water shall be subject to apportionment after October 1, 1963. Thus said compact attempts to deprive the State of Arizona, its citizens, inhabitants and property owners, of their right to appropriate said 3,000,000 acre-feet of unappropriated water, all of which is now subject to appropriation in Arizona.

(3) Said compact defines the term "Colorado River System" so as to include therein the Gila River and its tributaries, of which the total flow, aggregating 3,000,000 acre-feet of water annually, was appropriated

and put to beneficial use prior to June 25, 1929. The State of New Mexico has but a slight interest, and the States of California, Nevada, Utah, Colorado and Wyoming have no interest whatever in said water. Since said compact provides that the water apportioned thereby shall include all water necessary to supply existing rights, the effect of including the Gila River and its tributaries as a part of said system would be to reduce by 3,000,000 acre-feet annually the quantity of water now subject to appropriation in Arizona.

(4) Said compact defines the terms "Colorado River Basin," "Upper Basin" and "Lower Basin" so as to include therein not only the actual drainage basin of the Colorado River, but also all parts of Arizona, California, Nevada, Utah, Colorado, New Mexico and Wyoming outside of said drainage basin, which are now or shall hereafter be beneficially served by water diverted from said Colorado River System. Thus said compact pretends to recognize and attempts to establish a right to use said water outside of the actual drainage basin of the Colorado River, which pretended right the State of Arizona expressly denies. Arizona is almost wholly within the actual drainage basin of the Colorado River. No part of Arizona outside of said drainage basin is or can be beneficially served by water diverted from said system. Hence the State of Arizona would not be benefited, but would be greatly injured, by including in said Upper and Lower Basins areas situated outside of said drainage basin and served by water diverted from said Colorado River System. The effect of such inclusion would be to reduce the quantity of water now subject to appropriation in Arizona by such quantity as might be diverted for use in such outside areas.

For the reasons aforesaid, and for other good and sufficient reasons, the Legislature of the State of Arizona has never ratified or approved said compact, and said compact is therefore inoperative, void and of no effect.

XV

On December 21, 1928, the Congress of the United States passed, and the President approved, an act entitled "An Act to provide for the construction of works for the protection and development of the Colorado River Basin, for the approval of the Colorado River Compact, and for other purposes." The short title of said act is "Boulder Canyon Project Act." A copy of said act is appended hereto at page 58. Said act provides in section 1 thereof that, for the purpose of controlling floods, improving navigation, regulating the flow of the Colorado River and providing for the storage and delivery of the water thereof for reclamation of public lands and other beneficial uses, and for the generation of electric power as a means of making the project therein authorized a self-supporting and financially solvent undertaking, the Secretary of the Interior, subject to the terms of the Colorado River Compact, is authorized to construct, operate and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon adequate to create a storage reservoir of a capacity of not less than 20,000,000 acre-feet of water, and to construct, equip, operate and maintain at or near said dam a complete plant and incidental structures suitable for the fullest economic development of electric power from the water discharged from said reservoir. Said dam and reservoir, if constructed, will be partly in Arizona and partly in Nevada, and will occupy one of the sites mentioned in paragraph X hereof. Said dam and reservoir will store all of the

8,000,000 acre-feet of unappropriated water now flowing in the Colorado River, all of which is now subject to appropriation in Arizona. Said act does not require the Secretary of the Interior to comply with the laws of the State of Arizona in carrying out the provisions of said act, but contemplates that he shall disregard said laws and proceed in violation thereof.

XVI

Said act further provides in section 1 thereof that the Secretary of the Interior is authorized to construct, operate and maintain a canal and appurtenant structures connecting Laguna Dam with the Imperial and Coachella Valleys in California, and that no charge shall be made for water or for the use, storage or delivery of water for irrigation or potable purposes in said Imperial or Coachella Valleys. Said canal and appurtenant structures will cost approximately $40,000,000, and will be used for the purpose of diverting and conveying to said valleys in California, for use therein, the water to be stored in said reservoir, including the 8,000,000 acre-feet of unappropriated water now flowing in the Colorado River, all of which is now subject to appropriation in Arizona. Said canal and appurtenant structures will greatly aid and facilitate the diversion to and use of said water in California. Said act does not provide any similar facilities, or any facilities whatever, for the benefit of water users in Arizona, nor does said act exempt Arizona water users from the payment of charges for water or for the use, storage or delivery of water for irrigation or potable purposes.

XVII

Said act provides in section 2 (b) thereof that the Secretary of the Treasury is authorized to advance, from

time to time and within the appropriations therefor, such amounts as the Secretary of the Interior deems necessary for carrying out the provisions of said act, but that the aggregate amount of such advances shall not exceed the sum of $165,000,000. Said act provides in section 3 thereof that there is authorized to be appropriated from time to time such sums of money as may be necessary to carry out the purposes of said act, not exceeding in the aggregate $165,000,000.

XVIII

Said act provides in section 4 (a) thereof that it shall not take effect and that no authority shall be exercised thereunder unless and until (1) the States of Arizona, California, Nevada, Utah, New Mexico, Colorado and Wyoming shall ratify the Colorado River Compact, and the President by public proclamation shall so declare, or (2) if said States shall fail to ratify said compact within six months from the date of the passage of said act, then until six of said States, including the State of California, shall ratify said compact and consent to waive those provisions thereof which require its approval by the legislatures of all the signatory States, and shall approve said compact without conditions, save that of such six-state approval, and the President by public proclamation shall so declare, and, further, until the State of California, by act of its legislature, shall agree irrevocably and unconditionally with the United States, for the benefit of the States of Arizona, Nevada, Utah, New Mexico, Colorado and Wyoming, that the aggregate annual consumptive use of water of and from the Colorado River for use in California shall not exceed 4,400,000 acre-feet of the water apportioned to said Lower Basin by the Colorado River Compact, plus not more than one-half

of any excess or surplus water unapportioned by said compact, such uses always to be subject to the terms of said compact. The State of Arizona has not ratified or approved said compact, but the States of California, Nevada, Utah, New Mexico, Colorado and Wyoming ratified said compact prior to June 25, 1929, and consented to waive those provisions thereof which require its approval by all the signatory states, and approved said compact without conditions, save that of such six-state approval, and on said last mentioned date the President of the United States by public proclamation so declared. The State of California, by an act of its legislature approved March 4, 1929, made the agreement provided for in section 4 (a) of said Boulder Canyon Project Act.

XIX

Said act further provides in section 4 (a) thereof that the States of Arizona, California and Nevada are authorized to enter into an agreement which shall provide that, of the 7,500,000 acre-feet of water apportioned to said Lower Basin by the Colorado River Compact, there shall be apportioned to the State of Nevada 300,000 acre-feet, and to the State of Arizona 2,800,000 acre-feet, for exclusive beneficial consumptive use in perpetuity; that all of the provisions of said proposed agreement shall be subject in all parts to the provisions of said compact; and that said proposed agreement shall take effect upon the ratification of said compact by the States of Arizona, California and Nevada. Said proposed apportionment of 2,800,000 acre-feet of water is less than the quantity of water already appropriated in Arizona, and would provide no water for future appropriation in said State. Thus, under said proposed agreement, the State of Arizona, its citizens, inhabitants and property owners, would be de-

prived of their right to appropriate any of the unappropriated water of said Colorado River System, aggregating 9,000,000 acre-feet annually, all of which is now subject to appropriation in Arizona. The States of Arizona, California and Nevada have not entered into said proposed agreement, nor have they entered into any agreement whatsoever.

XX

Said act provides in section 4 (b) thereof that, before any money is appropriated for the construction of said dam or power plant, or any construction work done or contracted for, the Secretary of the Interior shall make provision for revenues, by contract, in accordance with the provisions of said act, adequate in his judgment to insure payment of all expenses of operation and maintenance of said works incurred by the United States, and the repayment, within 50 years from the date of the completion of said works, of all amounts advanced by the United States for the construction of said works (other than said canal and appurtenant structures), together with interest thereon at the rate of four per cent. per annum. The facts regarding the pretended contracts by which said Secretary has attempted to provide such revenues are set forth in paragraphs XXXII and XXXIII hereof. By an act approved July 3, 1930, and known as the "Second Deficiency Act, Fiscal Year 1930", Congress appropriated the sum of $10,660,000 for the commencement of construction of said dam and incidental works.

XXI

Said Boulder Canyon Project Act provides in section 5 thereof that said Secretary is authorized, under such general regulations as he may prescribe, to contract for the

storage of water in said reservoir, for the delivery thereof for irrigation, domestic use and generation of electric power, and for the delivery thereof to States, municipal corporations, political subdivisions and private corporations, upon charges that will provide revenue which, in addition to other revenue accruing under the Reclamation Law and under said act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under said act, and the payments to the United States provided for in section 4 (b) thereof; that contracts respecting water for irrigation and domestic use shall be for permanent service; and that no person shall have or be entitled to the use of the water stored in said reservoir except by contract with said Secretary. The effect of said act would be to withdraw from appropriation all of the water to be stored in said reservoir, including the 8,000,000 acre-feet of unappropriated water now flowing in the Colorado River, all of which is now subject to appropriation in Arizona; to prohibit the appropriation of said water; and to prohibit the use thereof, except by contract with the Secretary of the Interior. Under said act, said Secretary could not be required to deliver or to contract for the delivery of any of said water for use in Arizona, but could, if so minded, refuse to deliver or to contract for the delivery of any such water for any such use, and could thus withhold all of said water from use in Arizona. If said Secretary should choose to deliver or to contract for the delivery of any of said water for use in Arizona, he would be required by said act to make a charge for the storage and delivery of such water for such use, but said act does not require or permit said Secretary to make any charge for the storage or delivery of water for use in the Imperial and Coachella Valleys of California, it being

expressly provided in section 1 of said act that no such charge shall be made. In authorizing said Secretary to contract for the delivery of said stored water, said act does not restrict the use thereof to the drainage basin of the Colorado River, but permits said Secretary to contract for the delivery of said water for use outside of said basin.

XXII

Said act further provides in section 5 thereof that after repayment to the United States of all money advanced, with interest, charges shall be on such basis as may hereafter be prescribed by Congress; that the revenues derived therefrom shall be kept in a separate fund to be expended in said Colorado River Basin; and that general and uniform regulations shall be prescribed by said Secretary for the awarding of contracts for the sale and delivery of electric power, and for renewal of such contracts.

XXIII

Said act provides in section 6 thereof that said dam and reservoir shall be used, first, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights; and third, for power; that the title to said dam, reservoir, power plant and incidental works shall forever remain in the United States; that the United States shall, until otherwise provided by Congress, control, manage and operate the same; that said Secretary may lease a unit or units of said power plant, with the right to generate electric power, or may lease the use of water for the generation of such power. Said act does not provide for the levy or collection by the State of Arizona of any tax or taxes on said dam, power plant and other

works, or on the operation thereof, but contemplates that the same shall be exempt from all taxation. The effect of said act would be to have said Secretary, on behalf of the United States, engage in the business of storing and selling water, the business of generating and selling electric power and the business of leasing water and equipment for the generation of such power; to utilize for that purpose the water and other natural resources of the State of Arizona; to prevent the use of said water and natural resources by other persons or corporations desiring to engage in such businesses; and thus to deprive said State of its right to levy and collect taxes on such businesses and on the property used in connection therewith.

XXIV

Said act provides in section 8 (a) thereof that the United States, its permittees, licensees and contractees and all users and appropriators of water stored, diverted, carried or distributed by said reservoir, canals and other works shall observe and be subject to and controlled by the Colorado River Compact in the construction, management and operation of said reservoir, canals and other works and in the storage, diversion, delivery and use of water for the generation of power, irrigation and other purposes, anything in said act to the contrary notwithstanding; and that all permits, licenses and contracts shall so provide. The pretended contracts hereinafter referred to, do so provide.

XXV

Said act provides in section 13 thereof that the Colorado River Compact is approved by the Congress of the United States; that those provisions of said compact

which require its approval by the legislatures of all the signatory States, are waived; and that said approval by Congress shall become effective when the State of California and at least five of the other signatory States shall approve said compact and consent to said waiver. The States of California, Nevada, Utah, New Mexico, Colorado and Wyoming have approved said compact and consented to said waiver. Thus the effect of said act would be to subject the State of Arizona to said compact, and to enforce said compact and make it effective in Arizona notwithstanding said State has never ratified or approved said compact.

XXVI

Said act further provides in section 13 thereof that the rights of the United States in or to the water of the Colorado River and its tributaries, and the rights of those claiming under the United States, shall be subject to and controlled by the Colorado River Compact; that all patents, grants, contracts, concessions, leases, permits, licenses, rights of way or other privileges from the United States or under its authority necessary or convenient for the use of said water, or for the generation of electric power by means thereof, or for the transmission of such power, shall be upon the express condition and with the express covenant that the rights of the recipients or holders thereof shall be subject to and controlled by said compact; and that said conditions and covenants shall be deemed to run with the land, and shall attach as a matter of law, whether set out or referred to in the instrument evidencing such patent, grant, contract, concession, lease, permit, license, right of way or other privilege, or not, and shall be deemed to be for the benefit of and be available to the States of Arizona, California, Nevada, Utah, New

Mexico, Colorado and Wyoming, and the users of water therein or thereunder, by way of suit, defense or otherwise, in any litigation respecting the water of the Colorado River or its tributaries. All lands in Arizona are owned and held either by the United States or by those claiming under the United States. All rights to the use of water for irrigation in Arizona are appurtenant to land, and such rights have no existence separate and apart from the land to which they are appurtenant. Consequently, the water of the Colorado River and its tributaries cannot be used for irrigation in Arizona except by those holding land under patents, grants, contracts, concessions, leases, permits or licenses from the United States or under its authority. Moreover, in order to irrigate Arizona land, it is frequently necessary to utilize rights of way over public land of the United States. Thus, under said act, all users of water for irrigation in Arizona would be subjected to the Colorado River Compact, notwithstanding said State has never ratified or approved said compact.

XXVII

Said act provides in section 16 thereof that any commission or commissioner duly authorized under the laws of any State ratifying the Colorado River Compact shall have the right to act in an advisory capacity to and in co-operation with the Secretary of the Interior in the exercise of any authority under the provisions of sections 4 and 5 of said act, and shall at all times have access to records of all Federal agencies empowered to act under said sections, and shall be entitled to have copies of said records on request. Duly authorized commissions and commissioners of the States of California, Nevada, Utah, New Mexico, Colorado and Wyoming have exercised and

are exercising the rights and privileges conferred by said section 16.

XXVIII

Said Boulder Canyon Project Act is in excess of the powers granted to Congress by the Constitution of the United States, and is unconstitutional and void, for the reasons following, to-wit:

(1) Said act attempts to deprive the State of Arizona of its sovereign jurisdiction and control of the water and other natural resources of said State, particularly the water of the Colorado River and its tributaries flowing in said State and the dam sites and reservoir sites situated therein; to vest such jurisdiction and control in the United States; to abrogate and supersede the laws of said State respecting the appropriation and use of said water and other natural resources; and to prohibit such appropriation and use, except as authorized and provided for in said act.

(2) Said act attempts to subject the State of Arizona to the Colorado River Compact, and to enforce said compact and make it effective in Arizona, notwithstanding said State has never ratified or approved said compact. Thereby said act attempts to deprive said State, its citizens, inhabitants and property owners, of their right to appropriate the 5,000,000 acre-feet of unappropriated water which said compact attempts to apportion to said Upper Basin, and of their right to appropriate the 3,000,000 acre-feet of unappropriated water which said compact leaves unapportioned and attempts to withdraw from appropriation, as aforesaid. Said 5,000,000 acre-feet of apportioned water and said 3,000,000 acre-feet of unapportioned water are a part of the un-

appropriated water of said Colorado River System, all of which is now subject to appropriation in Arizona.

(3) Said act attempts to authorize the Secretary of the Interior to construct, operate and maintain a dam and reservoir in the Colorado River at Black Canyon; to store in said reservoir the 8,000,000 acre-feet of unappropriated water now flowing in said river, all of which is now subject to appropriation in Arizona; to withhold all of said water from appropriation and to prohibit the appropriation thereof; to withhold all of said water from use in Arizona, or, if he permits any such use, to require payment of such charges therefor as he may prescribe; and to sell and dispose of any part or all of said water for use in other States, even to the extent of selling and delivering it for use outside of the drainage basin of the Colorado River; all of which is to be done without the consent of the State of Arizona and in violation of its laws. Thereby said act attempts to deprive the State of Arizona, it citizens, inhabitants and property owners, of their right to appropriate said 8,000,000 acre-feet of unappropriated water, and of their right to use any of said water in Arizona, except by contract with the Secretary of the Interior and upon payment of such charges as he may prescribe.

(4) Said act attempts to discriminate against the State of Arizona in favor of the State of California by providing that the water to be stored in said reservoir shall be delivered without charge for use in the Imperial and Coachella Valleys in California, whereas all water users in Arizona are required to pay for said stored water such charges as the Secretary of the Interior may prescribe, and by providing a canal and other facilities to enable water users in California to divert and use said

water, whereas no similar facilities, nor any facilities whatever, are provided for the benefit of water users in Arizona. Thereby said act attempts to aid and facilitate the use of said stored water in California, and to hinder and prevent the use thereof in Arizona. Said stored water will include the 8,000,000 acre-feet of unappropriated water now flowing in the Colorado River, all of which is now subject to appropriation in Arizona.

(5) Said act attempts to authorize the Secretary of the Interior, on behalf of the United States, to engage in the business of storing and selling water, the business of generating and selling electric power and the business of leasing water and equipment for the generation of such power; to utilize for that purpose the water and other natural resources of the State of Arizona; to prevent the use of said water and natural resources by other persons or corporations desiring to engage in such businesses; and to deprive said State of its right to levy and collect taxes on such businesses and on the property used in connection therewith.

The power to do all or any of the things so attempted by said act has not been granted to Congress by the Constitution of the United States.

XXIX

The recital in said act that the purpose thereof is the improvement of navigation and the reclamation of public land is a mere subterfuge and false pretense. That the improvement of navigation is not the purpose of said act is evident from the fact that the Colorado River is not navigable, and from the further fact that said act ratifies and approves the Colorado River Compact, and provides that the United States shall observe and be sub-

ject to and controlled by said compact in the construction, management and operation of said reservoir, canals and other works, and the storage, diversion, delivery and use of water for the generation of power, irrigation and other purposes, anything in said act to the contrary notwithstanding, and from the further fact that said compact provides that, inasmuch as the Colorado River has ceased to be navigable for commerce, and the reservation of its water for navigation would seriously limit the development of its basin, the use of its water for purposes of navigation shall be subservient to the use of such water for domestic, agricultural and power purposes. Even if said river were navigable, the diversion, sale and delivery of water therefrom, as authorized in said act, would not improve, but would destroy, its navigable capacity. That the reclamation of public land is not the purpose of said act is evident from the fact that 75 per cent. of all land which will or can be reclaimed or benefited by the construction of the dam, reservoir, power plant and other works authorized in said act, or by the storage and delivery of water as in said act provided, is privately owned land. Except for the purpose of having the Secretary of the Interior engage in the water and power business, as hereinabove alleged, the dam, reservoir, power plant and other works provided for in said act are unnecessary and inappropriate. If reclamation of public land were the true purpose of said act, a dam and reservoir having one-fifth of the capacity and requiring one-fifth of the expenditure authorized in said act would accomplish said purpose as adequately and efficiently as the dam, reservoir and other works therein authorized.

XXX

Notwithstanding the unconstitutionality of said act, defendant Ray Lyman Wilbur, Secretary of the In-

terior, has proceeded and is now proceeding thereunder, and has threatened and now threatens to enforce and carry out the provisions of said act, and, unless enjoined therefrom, will enforce and carry out all of said provisions, and will thereby accomplish and effect all of the things attempted by said act, as set forth in paragraph XXVIII hereof. Pursuant to and under color of said act, said defendant has seized and taken possession of all that part of the Colorado River which flows in Arizona and on the boundary thereof, and all of the water flowing in said river, including the 8,000,000 acre-feet of unappropriated water now flowing therein, and all of the dam sites and reservoir sites mentioned in paragraph X hereof, and now has said river, said water and said sites in his possession; has excluded and is now excluding the State of Arizona, its citizens, inhabitants and property owners from said river, said water and said sites, and from all access thereto; has prevented and is now preventing said State, its citizens, inhabitants and property owners from appropriating any of said 8,000,000 acre-feet of unappropriated water, all of which is now subject to appropriation in Arizona; has thereby prevented and is now preventing the irrigation of the land in the irrigation projects mentioned in paragraph XI hereof; and, unless enjoined therefrom, will continue so to do.

XXXI

Pursuant to and under color of said act, said defendant Ray Lyman Wilbur has made surveys, plans and specifications for, and has commenced, the construction of the dam, reservoir, power plant and other works provided for in said act. According to said plans and specifications, said dam will have a height of 727 feet, said reservoir will have a storage cacapity of 29,500,000

acre-feet, and said power plant will have a generating capacity of 1,200,000 horsepower. Also, pursuant to and under color of said act, said defendant has made and prescribed general regulations respecting contracts for the storage of water in said reservoir and for the delivery thereof for irrigation and domestic use. A copy of said regulations is appended hereto at page 78. Said regulations provide that water stored in said reservoir will be sold upon such terms and conditions as the Secretary of the Interior may fix from time to time, but that no charge shall be made for water, or for the use, storage or delivery of water for irrigation or potable purposes in the Imperial or Coachella Valleys of California; that no person shall have or be entitled to the use of any water stored in said reservoir, except by contract made in pursuance of said regulations; that contracts respecting water for domestic use shall be for permanent service; and that all purchases of water shall be subject to the terms and provisions of the Colorado River Compact and of the Boulder Canyon Project Act.

XXXII

Pursuant to and under color of said act and of said regulations, said defendant Ray Lyman Wilbur has made a pretended contract with the Metropolitan Water District of Southern California, a municipal corporation of the State of California, for the storage of water in said reservoir and for the diversion, sale and delivery of said water to said District for transportation to and consumptive use in said District. A copy of said pretended contract is appended hereto at page 79. Said District consists of the City of Los Angeles and the municipalities of Anaheim, Beverly Hills, Burbank, Colton, Glendale, Pasadena, San Bernardino, San Marino, Santa Ana and

Santa Monica, which are municipal corporations of the State of California. Said District is situated on the Pacific Coast approximately 300 miles distant from the Colorado River and outside of its drainage basin. No public land of the United States is contained within the limits of said District. Said pretended contract is for permanent service, and provides for the delivery to said District of 1,050,000 acre-feet of said stored water annually, and for the payment by said District of 25 cents per acre foot for water so delivered. Said 1,050,000 acre-feet of water, if sold and delivered to said District, as in said pretended contract provided, cannot, nor can any part thereof, be used for the reclamation of public land of the United States. Said water is a part of the 8,000,000 acre-feet of unappropriated water now flowing in the Colorado River, all of which is now subject to appropriation in Arizona. Said 1,050,000 acre-feet of water, together with the 6,500,000 acre-feet of water heretofore appropriated and now being used in said Lower Basin, will exceed the full amount of 7,500,000 acre-feet of water which said compact attempts to apportion to said Lower Basin. The delivery of said 1,050,000 acre-feet of water to said District, as in said pretended contract provided, would exhaust said apportionment, and, by the terms of said compact and of said Boulder Canyon Project Act, no water would then be available for or subject to appropriation in said Lower Basin, although there would still remain in said Colorado River System 7,950,000 acre-feet of unappropriated water per year. Thus the effect of carrying out the provisions of the Boulder Canyon Project Act and of said pretended contract would be to deprive the State of Arizona, its citizens, inhabitants and property owners, of their right to appropriate any of the unappropriated water of said Colorado River System, aggregating,

as aforesaid, 9,000,000 acre-feet annually, all of which is now subject to appropriation in Arizona.

XXXIII

Pursuant to and under color of said act, said defendant Ray Lyman Wilbur has made and prescribed general regulations for the lease of electric power to be generated at said dam. A copy of said regulations is appended hereto at page 89. Pursuant to and under color of said act and of said regulations, said defendant has made a pretended contract with said City of Los Angeles and Southern California Edison Company, Limited, a corporation of the State of California, for the lease of power privileges at said dam, and a pretended contract with said Metropolitan Water District of Southern California for the sale of electric power to be generated at said dam. Said pretended contract for the lease of power privileges provides for the leasing of certain generating machinery to be installed by said defendant, part to said City and part to said Company; for the generation by said lessees of all electric power allotted by said defendant; for the delivery to said lessees of falling water from said reservoir sufficient to generate all power so sold; for the sale to said lessees, respectively, of amounts of electric power specified therein; and for the payment by said lessees of the cost of said machinery, and certain further sums on account of electric power to be taken by said lessees. Said pretended contract is for a period of 50 years. The pretended contract with said District in this paragraph referred to provides for the sale to said District of specified amounts of electric power annually for a period of 50 years. Said power is to be used for the sole purpose of pumping into and in a proposed aqueduct, to be constructed by said District, the 1,050,000 acre-feet of

water to be sold and delivered to said District, as provided in the pretended contract referred to in the last preceding paragraph hereof. The three pretended contracts hereinabove referred to are made upon the express condition that all rights thereunder shall be subject to and controlled by the Colorado River Compact. For the reasons heretofore stated, all of said pretended contracts are void and of no effect. Nevertheless, said defendant, unless enjoined therefrom, will carry out all the provisions of said pretended contracts.

XXXIV

Said defendant Ray Lyman Wilbur has not complied and will not comply with the laws of the State of Arizona referred to in paragraph XII hereof, but has disregarded and will wholly disregard said laws in carrying out the provisions of said act. Said defendant has not applied and will not apply to the State Water Commissioner of the State of Arizona for a permit authorizing the construction of said dam, reservoir, power plant or other works, or the storage, use, diversion, sale or delivery of the water to be stored in said reservoir, nor has any such permit been granted. Said defendant has not applied and will not apply to the State Engineer of the State of Arizona for his approval of said dam and reservoir, nor has any such approval been granted.

XXXV

Pursuant to and under color of said act, the States of California, Nevada, Utah, New Mexico, Colorado and Wyoming, defendants herein, have caused and are causing their duly authorized commissions and commissioners to act, and said commissions and commissioners have acted and are acting, in an advisory capacity to and in

co-operation with said defendant Ray Lyman Wilbur in the exercise of the authority vested or attempted to be vested in him by sections 4 and 5 of said act. Said defendant States, by their said commissions and commissioners, have claimed and are claiming an interest in the three pretended contracts made by said defendant Ray Lyman Wilbur, as hereinabove alleged, for that, after repayment to the United States of all money advanced, with interest, the revenues to be derived from said pretended contracts are to be kept in a separate fund and expended within the Colorado River Basin, as provided in said section 5, and said defendant States have claimed and are claiming an interest in said fund. Also, pursuant to and under color of said act, said defendant States have claimed and are claiming that the Colorado River Compact became effective when approved by Congress and by said defendant States, and that the State of Arizona, its citizens, inhabitants and property owners, are subject to and controlled by said compact, notwithstanding said State has never ratified or approved said compact. Said defendant States have also aided and abetted, are aiding and abetting, and, unless enjoined therefrom, will continue to aid and abet, said defendant Ray Lyman Wilbur in carrying out the provisions of said act.

XXXVI

If the defendants shall enforce and carry out the provisions of said act and of said pretended contracts, the State of Arizona, its citizens, inhabitants and property owners, will be thereby prevented from appropriating any of the unappropriated water of the Colorado River and its tributaries, aggregating 9,000,000 acre-feet annually, all of which is now subject to appropriation in Arizona, and from using any of said unappropriated

water, except in accordance with and subject to the Colorado River Compact, and from using any of the 8,000,000 acre-feet thereof now flowing in the main stream of said river, except by contract with the Secretary of the Interior, and upon payment of such charges as he may prescribe; it will be impossible to appropriate water for the irrigation of the whole or any part of the 2,000,000 acres of unirrigated but irrigable land referred to in paragraphs IX, X and XI hereof; it will be impossible to finance the irrigation projects referred to in said paragraphs, or any other irrigation project in Arizona, or to construct the dams, reservoirs, canals and other works necessary for the irrigation of the whole or any part of said land; all of said land will remain forever unirrigated, uncultivated, uninhabited, unused, and incapable of use; it will be impossible for the power projects mentioned in said paragraph XI to carry out their plans for generating and selling electric power at plants to be constructed at the sites mentioned in said paragraphs X and IX; the great increase in population, wealth, prosperity and taxable resources of said State, which would have resulted from the irrigation of said land and from the use of said power sites, will be prevented and made impossible; and said State will thereby suffer great and irreparable injury, for which it has and can have no adequate remedy at law.

WHEREFORE, your complainant prays that the Colorado River Compact and the Boulder Canyon Project Act, and each and every part thereof, be decreed to be unconstitutional, void and of no effect; that the defendants and each of them be permanently enjoined and restrained from enforcing or carrying out said compact or said act, or any of the provisions thereof, and from carrying out the three pretended contracts hereinabove

referred to, or any of them, or any of their provisions, and from doing any other act or thing pursuant to or under color of said Boulder Canyon Project Act; and that the State of Arizona recover its costs herein expended, and have such other and further relief as to this Court may seem just and equitable.

K. BERRY PETERSON,
Attorney General of the State of Arizona, Solicitor for Complainant.

DEAN G. ACHESON,
CLIFTON MATHEWS,
Of Counsel.

APPENDIX

APPENDIX

APPENDIX

ARIZONA STATUTES

Revised Code of 1928, Sections 3280-3286.

Section 3280. The water of all sources flowing in streams, canyons, ravines or other natural channels, or in definite underground channels, whether perennial or intermittent, flood, waste or surplus water, and of lakes ponds and springs on the surface, belongs to the public, and is subject to appropriation and beneficial use, as herein provided. Beneficial use shall be the basis, measure and limit to the use of water. Whenever the owner of a right to the use of water shall cease or fail to use the water appropriated for five successive years, the right to the use shall cease, and the water shall revert to the public and be again subject to appropriation.

Section 3281. Any person may appropriate any unappropriated water for domestic, municipal, irrigation, stock watering, water power, or mining uses, for his personal use or for delivery to consumers; the person first appropriating shall have the better right. Such person, to effect the beneficial use, may construct and maintain reservoirs, dams, canals, ditches, flumes, and other necessary waterways.

Section 3282. The governor shall appoint a state water commissioner, who shall be familiar with water law, hydraulics and irrigation. The commissioner shall hold office for a period of six years, be removable by the governor for cause,

maintain his office at the capitol and receive a salary of four thousand dollars per annum and his necessary traveling expenses; he shall have general control and supervision of the waters of the state, and of the appropriation and of the distribution thereof, excepting the distribution reserved to water commissioners appointed by the courts under existing decrees.

Section 3283. The commissioner may make surveys, investigations and compilations of the water resources in the state, and their potential development, and may co-operate for such purposes with the United States; he shall maintain a permanent public depository for existing and future records of stream flow, and other data relating to the water resources of the state; he may formulate and prescribe rules and regulations governing the appropriation and distribution of water. The commissioner shall have an official seal bearing the words, "Arizona State Water Commissioner" which shall be affixed to certificates, maps, plans and like instruments issued from his office.

Section 3284. Any person, including a municipality, the state, or the United States, intending to acquire the right to the beneficial use of water, shall make an application to the commissioner for a permit to make an appropriation of water. The application shall state the name and address of the applicant; the water supply from which the appropriation is applied for; the nature and amount of the proposed use; the location, point of diversion and description of the proposed works by which it is to be put to bene-

ficial use; the time within which it is proposed to begin construction and the time required for the completion of the construction and the application of the water to the proposed use. If the application is for agricultural purposes it shall give the legal subdivisions of the land and the acreage to be irrigated; if for power purposes, the nature of the works by which power is to be developed, the pressure head and amount of water to be utilized, the points of diversion and release of the water, and the uses to which the power is to be applied; if for the construction of a reservoir, the dimensions and description of dam, the capacity of the reservoir for each foot in depth, the description of the land to be submerged, and the uses to be made of the impounded waters; if for municipal uses, the present population to be served, and an estimate of the future requirements; if for mining purposes, the location and the nature of the mines to be served, and the methods of supplying and utilizing the waters. The application shall be accompanied by such maps, drawings and data as prescribed by the commissioner.

Section 3285. Upon receipt of the application, the commissioner shall indorse thereon the date of its receipt and keep a record thereof. If the application is defective, he shall return the same for correction or completion, indorse thereon the date of and reasons for the return, and keep a record thereof. The application shall not lose its priority of filing on account of such defects if corrected, completed and refiled in the office of the commissioner within sixty days from

its return to the applicant, or within such further time as the commissioner may, by an order of record, allow. Applications shall be recorded in a book kept for that purpose. The commissioner shall approve all applications, made in proper form contemplating the application of water to a beneficial use; but, when the application or the proposed use conflicts with vested rights, is a menace to the safety, or against the interests and welfare of the public, he shall reject the application. An application for the appropriation of the waters of a stream within the state for the generation of electric energy in excess of twenty-five thousand horsepower, or an application for a permit to build a dam for the generation of hydro-electric energy on a stream within the state in excess of twenty-five thousand horsepower, shall not be approved or granted unless authorized by an act of the legislature. A change in the use of water appropriated for domestic, municipal or irrigation uses, shall not be made without the approval of the commissioner; if the change contemplates the generation of hydro-electric energy or power of over twenty-five thousand horsepower, such approval shall not be granted unless authorized by an act of the legislature. Before approving or rejecting the application, the commissioner may require additional information to enable him to properly guard the public interest, and may, on applications proposing to divert more than ten cubic feet of water per second, require a statement of the following facts: If a corporation, a copy of the articles of incorporation, the names and resi-

dences of directors and officers, and the amount of its authorized and paid up capital; if not a corporation, the name of the party proposing to construct the works, and a showing of his financial ability to carry out the proposed work. He may also require the applicant to show that the proposed diversion will not conflict with vested rights. An application may be approved for less water than applied for, if substantial reasons exist therefor, and shall not be approved for more than can be applied to a beneficial use. Applications for municipal uses may be approved to the exclusion of all subsequent appropriations, if the estimated needs of the municipality so demand, upon consideration and order by the commissioner. As between two or more pending conflicting applications for the use of water from a given water supply, where the capacity of the supply is not sufficient for all applications, preference shall be given by the commissioner according to the relative values to the public of the proposed use. The relative values to the public for this purpose are: 1. Domestic and municipal uses, domestic uses to be construed to include gardens, not exceeding one-half acre to each family; 2. irrigation and stock watering; 3. water power and mining uses.

Section 3286. The approval or rejection of the application shall be indorsed thereon, a record thereof kept by the commissioner, and the application returned immediately to the applicant. If approved, the applicant may construct the necessary works, take steps to apply the water to a beneficial use and perfect the appropriation.

If the application is rejected, the applicant shall take no steps toward the construction of the proposed work or the diversion of the water.

Session Laws of 1929, Chapter 102, Sections 1 and 3.

Section 1. The words "state engineer" as hereinafter used shall mean the Arizona state highway engineer. The word "dam" as hereinafter used means any dam and appurtenant works for the impounding or diversion of water fifteen feet or more in height from ground level to the spillway crest or whose impounding capacity will be more than ten acre feet. All dams heretofore or hereafter built or now under construction shall be under the jurisdiction of the state engineer. Dams of the state, or of the United States, or any of their political subdivisions, or dams of public utilities, and all dams without exception are included within the jurisdiction hereby conferred. It shall be unlawful to construct, reconstruct, repair, operate, maintain, enlarge, remove, or alter any dam, except upon the approval of the state engineer. The state engineer shall employ such clerical, engineering and other expert assistance as may be necessary for such dam supervision, and fix their compensation. The state engineer may employ consulting engineers, geologists and other expert consultants. The records pertaining to dam supervision shall be public documents. The state engineer shall adopt and revise rules of procedure and regulations and issue general orders to effectuate this act.

Section 3. Construction of any new dam or the enlargement of any existing dam shall not be commenced until a written approval of plans and specifications has been obtained from the state engineer. A separate application for each dam shall be filed with the state engineer upon forms provided by him, reciting the name and address of the owner, or his agent; the location, type, size, and height of the proposed dam and appurtenant works; the storage capacity of the reservoir, and such other information as the state engineer requests. It shall also give the area of the drainage basin, rainfall, and stream flow records, flood flow records, and estimates and other similar information required by the state engineer. He may also require information concerning subsoil and foundation conditions and may require that the site be drilled or otherwise prospected. Where the physical conditions and the size of the dam do not require information required in the preceding sentence, they may be waived by the state engineer. The application shall state: The means, plans, and specifications by which the stream or body of water is to be dammed, by-passed, or controlled during construction; or, the means, plans, and specifications thereof shall be submitted to the state engineer for approval prior to the beginning of construction. The state engineer shall have the same authority over the construction and maintenance of such means during construction of the dam as he has over similar work on the dam proper. The application shall further recite the proposed time of beginning and of completion of construc-

tion; the estimated cost thereof; the use to which the impounded or diverted water is to be put, and shall be accompanied by maps, plans, and specifications and state such details and dimensions as the state engineer may require. Such maps, plans, and specifications shall be a part of the application. Prior to the approval of plans and specifications the state engineer may require a surety company bond in an amount to secure the costs to the state in rendering safe any dam which may be left partially constructed. Such bond may be required only when the state engineer doubts the financial inability of the owner or contractor, or deems the bond advisable.

COLORADO RIVER COMPACT.

The States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, having resolved to enter into a compact under the Act of the Congress of the United States of America approved August 19, 1921 (42 Statutes at Large, page 171), and the Acts of the Legislatures of the said States, have through their Governors appointed as their Commissioners:

W. S. Norviel for the State of Arizona,

W. F. McClure for the State of California,

Delph E. Carpenter for the State of Colorado,

J. G. Scrugham for the State of Nevada,

Stephen B. Davis, Jr., for the State of New Mexico,

R. E. Caldwell for the State of Utah,

Frank C. Emerson for the State of Wyoming,

who, after negotiations participated in by Herbert Hoov-

er, appointed by the President as the representative of the United States of America, have agreed upon the following articles:

ARTICLE I.

The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River System; to establish the relative importance of different beneficial uses of water; to promote interstate comity; to remove causes of present and future controversies; and to secure the expeditious agricultural and industrial development of the Colorado River Basin, the storage of its waters, and the protection of life and property from floods. To these ends the Colorado River Basin is divided into two Basins, and an apportionment of the use of part of the water of the Colorado River System is made to each of them with the provision that further equitable apportionments may be made.

ARTICLE II.

As used in this compact:

(a) The term "Colorado River System" means that portion of the Colorado River and its tributaries within the United States of America.

(b) The term "Colorado River Basin" means all of the drainage area of the Colorado River System and all other territory within the United States of America to which the waters of the Colorado River System shall be beneficially applied.

(c) The term "States of the Upper Division" means the States of Colorado, New Mexico, Utah, and Wyoming.

(d) The term "States of the Lower Division" means the States of Arizona, California, and Nevada.

(e) The term "Lee Ferry" means a point in the main stream of the Colorado River one mile below the mouth of the Paria River.

(f) The term "Upper Basin" means those parts of the States of Arizona, Colorado, New Mexico, Utah, and Wyoming within and from which waters naturally drain into the Colorado River System above Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the system above Lee Ferry.

(g) The term "Lower Basin" means those parts of the States of Arizona, California, Nevada, New Mexico, and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the system below Lee Ferry.

(h) The term "domestic use" shall include the use of water for household, stock, municipal, mining, milling, industrial, and other like purposes, but shall exclude the generation of electrical power.

ARTICLE III.

(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

(b) In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre-feet per annum.

(c) If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River System, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).

(d) The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.

(e) The States of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water which can not reasonably be applied to domestic and agricultural uses.

(f) Further equitable apportionment of the beneficial uses of the waters of the Colorado River System unapportioned by paragraphs (a), (b), and (c) may be made in the manner provided in paragraph (g) at any time after October first, 1963, if and when either Basin

shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b).

(g) In the event of a desire for a further apportionment, as provided in paragraph (f), any two signatory States, acting through their Governors, may give joint notice of such desire to the Governors of the other signatory States and to the President of the United States of America, and it shall be the duty of the Governors of the signatory States and of the President of the United States of America forthwith to appoint representatives, whose duty it shall be to divide and apportion equitably between the Upper Basin and Lower Basin the beneficial use of the unapportioned water of the Colorado River System, as mentioned in paragraph (f), subject to the legislative ratification of the signatory States and the Congress of the United States of America.

ARTICLE IV.

(a) Inasmuch as the Colorado River has ceased to be navigable for commerce and the reservation of its waters for navigation would seriously limit the development of its basin, the use of its waters for purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural, and power purposes. If the Congress shall not consent to this paragraph, the other provisions of this compact shall nevertheless remain binding.

(b) Subject to the provisions of this compact, water of the Colorado River System may be impounded and used for the generation of electrical power, but such impounding and use shall be subservient to the use and consumption of such water for agricultural and domestic purposes and shall not interfere with or prevent use for such dominant purposes.

(c) The provisions of this article shall not apply to or interfere with the regulation and control by any State within its boundaries of the appropriation, use, and distribution of water.

ARTICLE V.

The chief official of each signatory State charged with the administration of water rights, together with the Director of the United States Reclamation Service and the Director of the United States Geological Survey, shall cooperate, ex officio:

(a) To promote the systematic determination and coordination of the facts as to flow, appropriation, consumption and use of water in the Colorado River Basin, and the interchange of available information in such matters.

(b) To secure the ascertainment and publication of the annual flow of the Colorado River at Lee Ferry.

(c) To perform such other duties as may be assigned by mutual consent of the signatories from time to time.

ARTICLE VI.

Should any claim or controversy arise between any two or more of the signatory States (a) with respect to the waters of the Colorado River System not covered by the terms of this compact; (b) over the meaning or performance of any of the terms of this compact; (c) as to the allocation of the burdens incident to the performance of any article of this compact or the delivery of waters as herein provided; (d) as to the construction or operation of works within the Colorado

River Basin to be situated in two or more States, or to be constructed in one State for the benefit of another State; or (e) as to the diversion of water in one State for the benefit of another State; the Governors of the States affected, upon the request of one of them, shall forthwith appoint Commissioners with power to consider and adjust such claim or controversy, subject to ratification by the Legislatures of the States so affected.

Nothing herein contained shall prevent the adjustment of any such claim or controversy by any present method or by direct future legislative action of the interested States.

ARTICLE VII.

Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.

ARTICLE VIII.

Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that basin in which they are situate.

Article IX.

Nothing in this compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, for the protection of any right under this compact or the enforcement of any of its provisions.

Article X.

This compact may be terminated at any time by the unanimous agreement of the signatory States. In the event of such termination all rights established under it shall continue unimpaired.

Article XI.

This compact shall become binding and obligatory when it shall have been approved by the Legislatures of each of the signatory States and by the Congress of the United States. Notice of approval by the Legislatures shall be given by the Governor of each signatory State to the Governors of the other signatory States and to the President of the United States, and the President of the United States is requested to give notice to the Governors of the signatory States of approval by the Congress of the United States.

In witness whereof the Commissioners have signed this compact in a single original, which shall be deposited in the archives of the Department of State of the United States of America and of which a duly certified copy shall be forwarded to the Governor of each of the signatory States.

Done at the City of Santa Fe, New Mexico, this twenty-fourth day of November, A. D. one thousand nine hundred and twenty-two.

(Signed) W. S. Norviel.
(Signed) W. F. McClure.
(Signed) Delph E. Carpenter.
(Signed) J. G. Scrugham,
(Signed) Stephen B. Davis, Jr.
(Signed) R. E. Caldwell.
(Signed) Frank C. Emerson.

Approved:

(Signed) Herbert Hoover.

BOULDER CANYON PROJECT ACT.

An Act to provide for the construction of works for the protection and development of the Colorado River Basin, for the approval of the Colorado River compact, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking, the Secretary of the Interior, subject to the terms of the Colorado River compact hereinafter mentioned, is hereby authorized to construct, operate, and main-

tain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water and a main canal and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam, which the Secretary of the Interior is hereby authorized to construct if deemed necessary or advisable by him upon engineering or economic considerations, with the Imperial and Coachella Valleys in California, the expenditures for said main canal and appurtenant structures to be reimbursable, as provided in the reclamation law, and shall not be paid out of revenues derived from the sale or disposal of water power or electric energy at the dam authorized to be constructed at said Black Canyon or Boulder Canyon, or for water for potable purposes outside of the Imperial and Coachella Valleys: *Provided, however,* That no charge shall be made for water or for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella Valleys; also to construct and equip, operate, and maintain at or near said dam, or cause to be constructed, a complete plant and incidental structures suitable for the fullest economic development of electrical energy from the water discharged from said reservoir; and to acquire by proceedings in eminent domain, or otherwise, all lands, rights of way, and other property necessary for said purposes.

Sec. 2. (a) There is hereby established a special fund, to be known as the "Colorado River Dam fund" (hereinafter referred to as the "fund"), and to be available, as hereafter provided, only for carrying out the provisions of this Act. All revenues received in carrying

out the provisions of this Act shall be paid into and expenditures shall be made out of the fund, under the direction of the Secretary of the Interior.

(b) The Secretary of the Treasury is authorized to advance to the fund, from time to time and within the appropriations therefor, such amounts as the Secretary of the Interior deems necessary for carrying out the provisions of this Act, except that the aggregate amount of such advances shall not exceed the sum of $165,000,000. Of this amount the sum of $25,000,000 shall be allocated to flood control and shall be repaid to the United States out of 62½ per centum of revenues, if any, in excess of the amount necessary to meet periodical payments during the period of amortization, as provided in section 4 of this Act. If said sum of $25,000,000 is not repaid in full during the period of amortization, then 62½ per centum of all net revenues shall be applied to payment of the remainder. Interest at the rate of 4 per centum per annum accruing during the year upon the amounts so advanced and remaining unpaid shall be paid annually out of the fund, except as herein otherwise provided.

(c) Moneys in the fund advanced under subdivision (b) shall be available only for expenditures for construction and the payment of interest, during construction, upon the amounts so advanced. No expenditures out of the fund shall be made for operation and maintenance except from appropriations therefor.

(d) The Secretary of the Treasury shall charge the fund as of June 30 in each year with such amount as may be necessary for the payment of interest on advances made under subdivision (b) at the rate of 4 per centum per annum accrued during the year upon the

amounts so advanced and remaining unpaid, except that if the fund is insufficient to meet the payment of interest the Secretary of the Treasury may, in his discretion, defer any part of such payment, and the amount so deferred shall bear interest at the rate of 4 per centum per annum until paid.

(e) The Secretary of the Interior shall certify to the Secretary of the Treasury, at the close of each fiscal year, the amount of money in the fund in excess of the amount necessary for construction, operation, and maintenance, and payment of interest. Upon receipt of each such certificate the Secretary of the Treasury is authorized and directed to charge the fund with the amount so certified as repayment of the advances made under subdivision (b), which amount shall be covered into the Treasury to the credit of miscellaneous receipts.

Sec. 3. There is hereby authorized to be appropriated from time to time, out of any money in the Treasury not otherwise appropriated, such sums of money as may be necessary to carry out the purposes of this Act, not exceeding in the aggregate $165,000,000.

Sec. 4. (a) This Act shall not take effect and no authority shall be exercised hereunder and no work shall be begun and no moneys expended on or in connection with the works or structures provided for in this Act, and no water rights shall be claimed or initiated hereunder, and no steps shall be taken by the United States or by others to initiate or perfect any claims to the use of water pertinent to such works or structures unless and until (1) the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have ratified the Colorado River compact, mentioned in section 13 hereof, and the President by public proclamation shall have

so declared, or (2) if said States fail to ratify the said compact within six months from the date of the passage of this Act then, until six of said States, including the State of California, shall ratify said compact and shall consent to waive the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States signatory thereto, and shall have approved said compact without conditions, save that of such six-State approval, and the President by public proclamation shall have so declared, and, further, until the State of California, by act of its legislature, shall agree irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage of this Act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this Act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact.

The States of Arizona, California, and Nevada are authorized to enter into an agreement which shall provide (1) that of the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact, there shall be apportioned to the State of Nevada 300,000 acre-

feet and to the State of Arizona 2,800,000 acre-feet for exclusive beneficial consumptive use in perpetuity, and (2) that the State of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River compact, and (3) that the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State, and (4) that the waters of the Gila River and its tributaries, except return flow after the same enters the Colorado River, shall never be subject to any diminution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico but if, as provided in paragraph (c) of Article III of the Colorado River compact, it shall become necessary to supply water to the United States of Mexico from waters over and above the quantities which are surplus as defined by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply, out of the main stream of the Colorado River, one-half of any deficiency which must be supplied to Mexico by the lower basin, and (5) that the State of California shall and will further mutually agree with the States of Arizona and Nevada that none of said three States shall withhold water and none shall require the delivery of water, which can not reasonably be applied to domestic and agricultural uses, and (6) that all of the provisions of said tri-State agreement shall be subject in all particulars to the provisions of the Colorado River compact, and (7) said agreement to take effect upon the ratification of the Colorado River compact by Arizona, California, and Nevada.

(b) Before any money is appropriated for the construction of said dam or power plant, or any con-

struction work done or contracted for, the Secretary of the Interior shall make provision for revenues by contract, in accordance with the provisions of this Act, adequate in his judgment to insure payment of all expenses of operation and maintenance of said works incurred by the United States and the repayment, within fifty years from the date of the completion of said works, of all amounts advanced to the fund under subdivision (b) of section 2 for such works, together with interest thereon made reimbursable under this Act.

Before any money is appropriated for the construction of said main canal and appurtenant structures to connect the Laguna Dam with the Imperial and Coachella Valleys in California, or any construction work is done upon said canal or contracted for, the Secretary of the Interior shall make provision for revenues, by contract or otherwise, adequate in his judgment to insure payment of all expenses of construction, operation, and maintenance of said main canal and appurtenant structures in the manner provided in the reclamation law.

If during the period of amortization the Secretary of the Interior shall receive revenues in excess of the amount necessary to meet the periodical payments to the United States as provided in the contract, or contracts, executed under this Act, then, immediately after the settlement of such periodical payments, he shall pay to the State of Arizona 18¾ per centum of such excess revenues and to the State of Nevada 18¾ per centum of such excess revenues.

Sec. 5. That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points

on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this Act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this Act and the payments to the United States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

After the repayments to the United States of all money advanced with interest, charges shall be on such basis and the revenues derived therefrom shall be kept in a separate fund to be expended within the Colorado River Basin as may hereafter be prescribed by the Congress.

General and uniform regulations shall be prescribed by the said Secretary for the awarding of contracts for the sale and delivery of electrical energy, and for renewals under subdivision (b) of this section, and in making such contracts the following shall govern:

(a) No contract for electrical energy or for generation of electrical energy shall be of longer duration than fifty years from the date at which such energy is ready for delivery.

Contracts made pursuant to subdivision (a) of this section shall be made with a view to obtaining reasonable returns and shall contain provisions whereby at the end of fifteen years from the date of their execution and every ten years thereafter, there shall be readjustment of the contract, upon the demand of either party thereto, either upward or downward as to price, as the Secretary of the Interior may find to be justified by competitive conditions at distributing points or competitive centers, and with provisions under which disputes or disagreements as to interpretation or performance of such contract shall be determined either by arbitration or court proceedings, the Secretary of the Interior being authorized to act for the United States in such readjustments or proceedings.

(b) The holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased or acquired and such holder be compensated for damages to its property, used and useful in the transmission and distribution of such electrical energy and not taken, resulting from the termination of the supply.

(c) Contracts for the use of water and necessary privileges for the generation and distribution of hydroelectric energy or for the sale and delivery of electrical energy shall be made with responsible applicants therefor who will pay the price fixed by the said Secretary with a view to meeting the revenue requirements herein provided for. In case of conflicting applications, if any,

such conflicts shall be resolved by the said Secretary, after hearing, with due regard to the public interest, and in conformity with the policy expressed in the Federal Water Power Act as to conflicting applications for permits and licenses, except that preference to applicants for the use of water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy, or for delivery at the switchboard of a hydroelectric plant, shall be given, first, to a State for the generation or purchase of electric energy for use in the State, and the States of Arizona, California, and Nevada shall be given equal opportunity as such applicants.

The rights covered by such preference shall be contracted for by such State within six months after notice by the Secretary of the Interior and to be paid for on the same terms and conditions as may be provided in other similar contracts made by said Secretary: *Provided, however,* That no application of a State or a political subdivision for an allocation of water for power purposes or of electrical energy shall be denied or another application in conflict therewith be granted on the ground that the bond issue of such State or political subdivision, necessary to enable the applicant to utilize such water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy or the electrical energy applied for, has not been authorized or marketed, until after a reasonable time, to be determind by the said Secretary, has been given to such applicant to have such bond issue authorized and marketed.

(d) Any agency receiving a contract for electrical energy equivalent to one hundred thousand firm horsepower, or more, may, when deemed feasible by the

said Secretary, from engineering and economic considerations and under general regulations prescribed by him, be required to permit any other agency having contracts hereunder for less than the equivalent of twenty-five thousand firm horsepower, upon application to the Secretary of the Interior made within sixty days from the execution of the contract of the agency the use of whose transmission line is applied for, to participate in the benefits and use of any main transmission line constructed or to be constructed by the former for carrying such energy (not exceeding, however, one-fourth the capacity of such line), upon payment by such other agencies of a reasonable share of the cost of construction, operation, and maintenance thereof.

The use is hereby authorized of such public and reserved lands of the United States as may be necessary or convenient for the construction, operation, and maintenance of main transmission lines to transmit said electrical energy.

Sec. 6. That the dam and reservoir provided for by section 1 hereof shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power. The title to said dam, reservoir, plant, and incidental works shall forever remain in the United States, and the United States shall, until otherwise provided by Congress, control, manage, and operate the same, except as herein otherwise provided: *Provided, however,* That the Secretary of the Interior may, in his discretion, enter into contracts of lease of a unit or units of any Government-built plant, with right to generate electrical energy,

or, alternatively, to enter into contracts of lease for the use of water for the generation of electrical energy as herein provided, in either of which events the provisions of section 5 of this Act relating to revenue, term, renewals, determination of conflicting applications, and joint use of transmission lines under contracts for the sale of electrical energy, shall apply.

The Secretary of the Interior shall prescribe and enforce rules and regulations conforming with the requirements of the Federal Water Power Act, so far as applicable, respecting maintenance of works in condition of repair adequate for their efficient operation, maintenance of a system of accounting, control of rates and service in the absence of State regulation or interstate agreement, valuation for rate-making purposes, transfers of contracts, contracts extending beyond the lease period, expropriation of excessive profits; recapture and/or emergency use by the United States of property of lessees, and penalties for enforcing regulations made under this Act or penalizing failure to comply with such regulations or with the provisions of this Act. He shall also conform with other provisions of the Federal Water Power Act and of the rules and regulations of the Federal Power Commission, which have been devised or which may be hereafter devised, for the protection of the investor and consumer.

The Federal Power Commission is hereby directed not to issue or approve any permits or licenses under said Federal Water Power Act upon or affecting the Colorado River or any of its tributaries, except the Gila River, in the States of Colorado, Wyoming, Utah, New Mexico, Nevada, Arizona, and California until this Act shall become effective as provided in section 4 herein.

Sec. 7. That the Secretary of the Interior may, in his discretion, when repayments to the United States of all money advanced, with interest, reimbursable hereunder, shall have been made, transfer the title to said canal and appurtenant structures, except the Laguna Dam and the main canal and appurtenant structures down to and including Syphon Drop, to the districts or other agencies of the United States having a beneficial interest therein in proportion to their respective capital investments under such form of organization as may be acceptable to him. The said districts or other agencies shall have the privilege at any time of utilizing by contract or otherwise such power possibilities as may exist upon said canal, in proportion to their respective contributions or obligations toward the capital cost of said canal and appurtenant structures from and including the diversion works to the point where each respective power plant may be located. The net proceeds from any power development on said canal shall be paid into the fund and credited to said districts or other agencies on their said contracts, in proportion to their rights to develop power, until the districts or other agencies using said canal shall have paid thereby and under any contract or otherwise an amount of money equivalent to the operation and maintenance expense and cost of construction thereof.

Sec. 8. (a) The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried, and/or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery, and use

of water for the generation of power, irrigation, and other purposes, anything in this Act to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide.

(b) Also the United States, in constructing, managing, and operating the dam, reservoir, canals, and other works herein authorized, including the appropriation, delivery, and use of water for the generation of power, irrigation, or other uses, and all users of water thus delivered and all users and appropriators of waters stored by said reservoir and/or carried by said canal, including all permittees and licensees of the United States or any of its agencies; shall observe and be subject to and controlled, anything to the contrary herein notwithstanding, by the terms of such compact, if any, between the States of Arizona, California, and Nevada, or any two thereof, for the equitable division of the benefits, including power, arising from the use of water accruing to said States, subsidiary to and consistent with said Colorado River compact, which may be negotiated and approved by said States and to which Congress shall give its consent and approval on or before January 1, 1929; and the terms of any such compact concluded between said States and approved and consented to by Congress after said date: *Provided*, That in the latter case such compact shall be subject to all contracts, if any, made by the Secretary of the Interior under section 5 hereof prior to the date of such approval and consent by Congress.

Sec. 9. That all lands of the United States found by the Secretary of the Interior to be practicable of irrigation and reclamation by the irrigation works authorized herein shall be withdrawn from public entry. Thereafter, at the direction of the Secretary of the In-

terior, such lands shall be opened for entry, in tracts varying in size but not exceeding one hundred and sixty acres, as may be determined by the Secretary of the Interior, in accordance with the provisions of the reclamation law, and any such entryman shall pay an equitable share in accordance with the benefits received, as determined by the said Secretary, of the construction cost of said canal and appurtenant structures; said payments to be made in such installments and at such times as may be specified by the Secretary of the Interior, in accordance with the provisions of the said reclamation law, and shall constitute revenue from said project and be covered into the fund herein provided for: *Provided*, That all persons who have served in the United States Army, Navy, or Marine Corps during the war with Germany, the war with Spain, or in the suppression of the insurrection in the Philippines, and who have been honorably separated or discharged therefrom or placed in the Regular Army or Navy Reserve, shall have the exclusive preference right for a period of three months to enter said lands, subject, however, to the provisions of subsection (c) of section 4, Act of December 5, 1924 (Forty-third Statutes at Large, page 702); and also, so far as practicable, preference shall be given to said persons in all construction work authorized by this Act: *Provided further*, That in the event such an entry shall be relinquished at any time prior to actual residence upon the land by the entryman for not less than one year, lands so relinquished shall not be subject to entry for a period of sixty days after the filing and notation of the relinquishment in the local land office, and after the expiration of said sixty-day period such lands shall be open to entry, subject to the preference in this section provided.

Sec. 10. That nothing in this Act shall be con-

strued as modifying in any manner the existing contract, dated October 23, 1918, between the United States and the Imperial Irrigation District, providing for a connection with Laguna Dam; but the Secretary of the Interior is authorized to enter into contract or contracts with the said district or other districts, persons, or agencies for the construction, in accordance with this Act, of said canal and appurtenant structures, and also for the operation and maintenance thereof, with the consent of the other users.

Sec. 11. That the Secretary of the Interior is hereby authorized to make such studies, surveys, investigations, and do such engineering as may be necessary to determine the lands in the State of Arizona that should be embraced within the boundaries of a reclamation project, heretofore commonly known and hereafter to be known as the Parker-Gila Valley reclamation project, and to recommend the most practicable and feasible method of irrigating lands within said project, or units thereof, and the cost of the same; and the appropriation of such sums of money as may be necessary for the aforesaid purposes from time to time is hereby authorized. The Secretary shall report to Congress as soon as practicable, and not later than December 10, 1931, his findings, conclusions, and recommendations regarding such project.

Sec. 12. "Political subdivision" or "political subdivisions" as used in this Act shall be understood to include any State, irrigation or other district, municipality, or other governmental organization.

"Reclamation law" as used in this Act shall be understood to mean that certain Act of the Congress of the United States approved June 17, 1902, entitled "An

Act appropriating the receipts from the sale and disposal of public land in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," and the Acts amendatory thereof and supplemental thereto.

"Maintenance" as used herein shall be deemed to include in each instance provision for keeping the works in good operating condition.

"The Federal Water Power Act," as used in this Act, shall be understood to mean that certain Act of Congress of the United States approved June 10, 1920, entitled "An Act to create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto; and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes," and the Acts amendatory thereof and supplemental thereto.

"Domestic" whenever employed in this Act shall include water uses defined as "domestic" in said Colorado River compact.

Sec. 13. (a) The Colorado River compact signed at Santa Fe, New Mexico, November 24, 1922, pursuant to Act of Congress approved August 19, 1921, entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes," is hereby approved by the Congress of the United States, and the provisions of the first paragraph of article 11 of the said Colorado River compact, making said compact binding and obligatory when it shall have been approved by the legislature of each of the

signatory States, are hereby waived, and this approval shall become effective when the State of California and at least five of the other States mentioned, shall have approved or may hereafter approve said compact as aforesaid and shall consent to such waiver, as herein provided.

(b) The rights of the United States in or to waters of the Colorado River and its tributaries howsoever claimed or acquired, as well as the rights of those claiming under the United States, shall be subject to and controlled by said Colorado River compact.

(c) Also all patents, grants, contracts, concessions, leases, permits, licenses, rights of way, or other privileges from the United States or under its authority, necessary or convenient for the use of waters of the Colorado River or its tributaries, or for the generation or transmission of electrical energy generated by means of the waters of said river or its tributaries, whether under this Act, the Federal Water Power Act, or otherwise, shall be upon the express condition and with the express covenant that the rights of the recipients or holders thereof to waters of the river or its tributaries, for the use of which the same are necessary, convenient, or incidental, and the use of the same shall likewise be subject to and controlled by said Colorado River compact.

(d) The conditions and covenants referred to herein shall be deemed to run with the land and the right, interest, or privilege therein and water right, and shall attach as a matter of law, whether set out or referred to in the instrument evidencing any such patent, grant, contract, concession, lease, permit, license, right of way, or other privilege from the United States or under its authority, or not, and shall be deemed to be for

the benefit of and be available to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, and the users of water therein or thereunder, by way of suit, defense, or otherwise, in any litigation respecting the waters of the Colorado River or its tributaries.

Sec. 14. This Act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided.

Sec. 15. The Secretary of the Interior is authorized and directed to make investigation and public reports of the feasibility of projects for irrigation, generation of electric power, and other purposes in the States of Arizona, Nevada, Colorado, New Mexico, Utah, and Wyoming for the purpose of making such information available to said States and to the Congress, and of formulating a comprehensive scheme of control and the improvement and utilization of the water of the Colorado River and its tributaries. The sum of $250,000 is hereby authorized to be appropriated from said Colorado River Dam fund, created by section 2 of this Act, for such purposes.

Sec. 16. In furtherance of any comprehensive plan formulated hereafter for the control, improvement, and utilization of the resources of the Colorado River system and to the end that the project authorized by this Act may constitute and be administered as a unit in such control, improvement, and utilization, any commission or commissioner duly authorized under the laws of any ratifying State in that behalf shall have the right to act in an advisory capacity to and in cooperation with the

Secretary of the Interior in the exercise of any authority under the provisions of sections 4, 5, and 14 of this Act, and shall have at all times access to records of all Federal agencies empowered to act under said sections, and shall be entitled to have copies of said records on request.

Sec. 17. Claims of the United States arising out of any contract authorized by this Act shall have priority over all others, secured or unsecured.

Sec. 18. Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreement.

Sec. 19. That the consent of Congress is hereby given to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming to negotiate and enter into compacts or agreements, supplemental to and in conformity with the Colorado River compact and consistent with this Act for a comprehensive plan for the development of the Colorado River and providing for the storage, diversion, and use of the waters of said river. Any such compact or agreement may provide for the construction of dams, headworks, and other diversion works or structures for flood control, reclamation, improvement of navigation, division of water, or other purposes and/or the construction of power houses or other structures for the purpose of the development of water power and the financing of the same; and for such purposes may authorize the creation of interstate commissions and/or the creation of corporations, authorities, or other instrumentalities.

(a) Such consent is given upon condition that a representative of the United States, to be appointed by the President, shall participate in the negotiations and shall make report to Congress of the proceedings and of any compact or agreement entered into.

(b) No such compact or agreement shall be binding or obligatory upon any of such States unless and until it has been approved by the legislature of each of such States and by the Congress of the United States.

Sec. 20. Nothing in this Act shall be construed as a denial or recognition of any rights, if any, in Mexico to the use of the waters of the Colorado River system.

Sec. 21. That the short title of this Act shall be "Boulder Canyon Project Act."

Approved, December 21, 1928.

WATER REGULATIONS.

Washington, April 23, 1930.

Storage water in Boulder Canyon Reservoir will be sold upon such terms and conditions as the Secretary may fix from time to time. Water so sold may be delivered at such points on the river as may be agreed upon for irrigation and domestic uses.

Contracts respecting water for domestic uses shall be for permanent service, and shall conform to Paragraph (a) of Section 4 of the Boulder Canyon Project Act. No charge shall be made for water or for the use, storage or delivery of water for irrigation or for water for potable purposes in the Imperial or Coachella Valleys.

Where water is taken from the Colorado River above the Boulder Canyon Dam, the utilization of the power plant will be impaired to that extent, and the right is reserved to make a higher charge for water taken above the dam, than if delivery is made below the dam.

No person shall have or be entitled to have the use for any purpose of the water stored in Boulder Canyon Reservoir except by contract made in pursuance of these regulations. All purchases of water shall be subject to all the terms and provisions of the Colorado River Compact and of the Boulder Canyon Project Act.

The right is reserved to amend or extend these regulations from time to time consistently with said compact and the laws of Congress, as the public need may require.

RAY LYMAN WILBUR,
Secretary of the Interior.

WATER CONTRACT.

(1) This contract, made this 24th day of April, nineteen hundred thirty, pursuant to the Act of Congress approved June 17, 1902, (32 Stat., 388), and acts amendatory thereof or supplementary thereto, all of which acts are commonly known and referred to as the reclamation law, and particularly pursuant to the Act of Congress approved December 21, 1928, (45 Stat., 1057), designated the Boulder Canyon Project Act, between the United States of America, hereinafter referred to as the United States, acting for this purpose by Ray Lyman Wilbur, Secretary of the Interior, hereinafter styled the Secretary, and The Metropolitan Water District of South-

ern California, a public corporation, hereinafter styled the District, organized and existing under the laws of the State of California;

Witnesseth:

(2) Whereas, for the purposes of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters for reclamation of public lands and other beneficial uses exclusively within the United States, the Secretary, subject to the terms of the Colorado River Compact, is authorized to construct, operate and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon, adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water; and

(3) Whereas, after full consideration of the advantages of both the Black Canyon and Boulder Canyon dam sites, the Secretary has determined upon Black Canyon as the site of the aforesaid dam, hereinafter styled the Boulder Canyon Dam, creating thereby a reservoir to be hereinafter styled the Boulder Canyon Reservoir and has determined that the revenues provided for by this contract, together with other contracts in accordance with the provisions of the Boulder Canyon Project Act, are adequate in his judgment to insure payment of all expenses of operation and maintenance of the Boulder Canyon Dam and appurtenant works incurred by the United States, and the repayment within fifty (50) years from the date of completion of said works of all amounts advanced to the Colorado River Dam Fund under Subdivision (b) of Section 2 of the Boulder Canyon Project

Act, together with interest thereon made reimbursable under said Act; and

(4) Whereas, the District is desirous of entering into a contract for the delivery to it of water from Boulder Canyon Reservoir:

(5) Now, therefore, in consideration of the mutual covenants herein contained, the parties hereto agree as follows, to wit:

(6) The United States shall deliver to the District each year from the Boulder Canyon Reservoir at a point in the Colorado River immediately below Boulder Canyon Dam, or as provided in Article 10 hereof, up to but not to exceed one million fifty thousand (1,050,000) acre feet of water, which shall be delivered continuously as far as reasonable diligence will permit; provided, that such amount is without prejudice to any additional rights which the District may have or acquire in or to the waters of the Colorado River, or to the power of the parties to contract hereafter with reference thereto. The United States shall not be obligated to deliver water to the District when for any reason such delivery would interfere with the use of Boulder Canyon Dam, and reservoir for river regulation, improvement of navigation, flood control, and/or satisfaction of present perfected rights, in or to the waters of the Colorado River, or its tributaries, in pursuance of Article VIII of the Colorado River Compact, and this contract is made upon the express condition and with the express covenant that the right of the District to waters of the Colorado River, or its tributaries, is subject to and controlled by the Colorado River Compact. The United States reserves the right to discontinue or temporarily reduce the amount of water to be delivered for the purpose of investigation,

inspection, maintenance, repairs, replacement or installation of equipment and/or machinery at Boulder Canyon Dam, but so far as feasible the United States will give the District reasonable notice in advance of such temporary discontinuance or reduction. The United States, its officers, agents and employees shall not be liable for damages when, for any reason whatsoever, suspensions or reductions in delivery of water occur. This contract is for permanent service, but is made subject to the express covenant and condition that in the event water for the District is not taken or diverted by the District hereunder for District purposes within a period of ten (10) years from and after completion of Boulder Canyon Dam as announced by the Secretary, it may in such event, upon the written order of the Secretary, and after hearing become null and void and of no effect.

(7) The District shall receive the water to be delivered to it by the United States under the terms hereof at the point of delivery above stated and shall at its own expense convey such water to its proposed aqueduct, and shall perform all acts required by law or custom in order to maintain its control over such water and to secure and maintain its lawful and proper diversion from the Colorado River.

(8) The water to be delivered hereunder shall be measured at the intake of the District's proposed aqueduct by such measuring and controlling devices or such automatic gauges or both, as shall be satisfactory to the Secretary. Said measuring and controlling devices, or automatic gauges, shall be furnished, installed and maintained by and at the expense of the District, but they shall be and remain at all times under the complete control of the United States, whose authorized representa-

tives may at all times have access to them over the lands and rights of way of the District.

(9) The District shall make full and complete written monthly reports as directed by the Secretary, on forms to be supplied by the United States, of all water diverted from the Colorado River. Such reports shall be made by the fifth day of the month immediately succeeding the month in which the water is diverted, and the records and data from which such reports are made shall be accessible to the United States on demand of the Secretary.

(10) A charge of twenty-five cents ($0.25) per acre-foot shall be made for water delivered to the District hereunder during the Boulder Dam cost repayment period. It is understood by the District that it may divert water above Boulder Canyon Dam, but that such diversion of water above the dam will reduce the amount of power otherwise available at said dam, and may reduce the amount which would have been utilized, except at times when the reservoir is spilling, and an additional charge, determined as stated below, will be made on account of any such reduction in energy which would otherwise have been utilized in case water is diverted above the dam. The energy which could have been generated by the water diverted above the dam and which would have been utilized, at times when the reservoir is not spilling will be calculated from the effective head, the quantity of water diverted and the overall efficiency of the power plant, as determined by the Secretary, whose determination shall be conclusive and binding upon the parties hereto. The additional charge per month for diversion above the dam will be the product of such amount of energy and the rate per kilowatt hour for

firm energy at Boulder Canyon Dam in effect at the time of such diversion. Nevertheless if such diversion during any year (June 1st to May 31st, inclusive) has not reduced the amount of firm energy during such year, for which the United States has contracted, the diversion, to the extent that no reduction in firm energy has been occasioned, shall be computed at the rate for secondary energy then in force and credit given on the ensuing year's power bills of the District for the difference between the amount charged therefor and the amount so determined. The Secretary's determination of such credit shall be conclusive. The reservoir shall be considered as spilling whenever water is being discharged in excess of the amount used for the generation of power, whether such waste occurs over the spillway or otherwise. Energy equivalent to water delivered above the dam, determined as above, for which the firm energy rate is charged, shall be included in the total firm energy available at the dam, defined as four billion, three hundred thirty million (4,330,000,000) kilowatt hours per year (June 1st to May 31st, inclusive), upon completion of the dam, as announced by the Secretary, and decreasing uniformly thereafter by eight million seven hundred sixty thousand (8,760,000) kilowatt hours per year, and also included in the District's allotment of firm energy. Nevertheless if it be determined by the Secretary that the rate of decrease above stated is not in accord with actual conditions, the Secretary reserves the right to fix a lesser rate for any year (June 1st to May 31st, inclusive), in advance.

(11) The District shall pay monthly for all water delivered to it hereunder, or diverted by it from the Colorado River, in accordance with the rate herein in Article ten (10) established. Payments shall be due on the

first of the second month immediately succeeding the month in which water is delivered and/or diverted. If such charges are not paid when due, a penalty of one per centum (1%) of the amount unpaid shall be added thereto, and thereafter an additional penalty of one per centum (1%) of the amount unpaid shall be added on the first day of each calendar month during such delinquency.

(12) The United States reserves the right to refuse to deliver water to the District in the event of default for a period of more than twelve (12) months in any payment due or to become due the United States under this contract.

(13) The Secretary or his representatives, shall at all times have the right of ingress to and egress from all works of the District for the purpose of inspection, repairs and maintenance of works of the United States, and for all other proper purposes. The Secretary or his representatives shall also have free access at all reasonable times to the books and records of the District relating to the diversion and distribution of water delivered to it hereunder with the right at any time during office hours to make copies of or from the same.

(14) Disputes or disagreements as to the interpretation or performance of the provisions of this contract shall be determined either by arbitration or court proceedings, the Secretary of the Interior being authorized to act for the United States in such proceedings. Whenever a controversy arises out of this contract, and the parties hereto agree to submit the matter to arbitration the District shall name one arbitrator and the Secretary shall name one arbitrator, and the two arbitrators thus chosen shall elect three other arbitrators, but in the

event of their failure to name all or any of the three arbitrators within five (5) days after their first meeting, such arbitrators, not so elected, shall be named by the Senior Judge of the United States Circuit Court of Appeals for the Ninth Circuit. The decision of any three of such arbitrators shall be a valid and binding award of the arbitrators.

(15) There is reserved to the Secretary the right to prescribe and enforce rules and regulations governing the delivery and diversion of water hereunder. Such rules and regulations may be modified, revised and/or extended from time to time after notice to the District and opportunity for it to be heard, as may be deemed proper, necessary, or desirable by the Secretary to carry out the true intent and meaning of the law and of this contract, or amendments hereof, or to protect the interests of the United States. The District hereby agrees that in the operation and maintenance of its diversion works and aqueduct, all such rules and regulations will be fully adhered to.

(16) This contract is made upon the express condition and with the express understanding that all rights hereunder shall be subject to and controlled by the Colorado River Compact, being the compact or agreement signed at Santa Fe, New Mexico, November 24, 1922, pursuant to Act of Congress approved August 19, 1921, entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes," which Compact was approved in Section 13 (a) of the Boulder Canyon Project Act.

(17) Claims of the United States arising out of this contract shall have priority over all others, secured or unsecured.

(18) This contract is subject to appropriations being made by Congress from year to year of moneys sufficient to do the work provided for herein, and to there being sufficient moneys available in the Colorado River Dam Fund to permit allotments to be made for the performance of such work. No liability shall accrue against the United States, its officers, agents, or employees, by reason of sufficient moneys not being so appropriated nor on account of there not being sufficient moneys in the Colorado River Dam Fund to permit of said allotments. This agreement is also subject to the condition that if Congress fails to appropriate moneys for the commencement of construction work within five (5) years from and after execution hereof, or if for any other reason construction of Boulder Canyon Dam is not commenced within said time and thereafter prosecuted to completion with reasonable diligence, then and in such event either party hereto may terminate its obligations hereunder upon one (1) year's written notice to the other party hereto.

(19) All rights of action for breach of any of the provisions of this contract are reserved to the United States as provided in Section 3737 of the Revised Statutes of the United States.

(20) Nothing contained in this contract shall be construed as in any manner abridging, limiting or depriving the United States of any means of enforcing any remedy either at law or in equity for the breach of any of the provisions hereof which it would otherwise have.

(21) No interest in this agreement is transferable, and no sublease shall be made, by the District without the written consent of the Secretary, and any such attempted transfer or sublease shall cause this contract to become subject to annulment, at the option of the United States.

(22) No Member of or Delegate to Congress or Resident Commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom. Nothing, however, herein contained shall be construed to extend to this contract if made with a corporation for its general benefit.

In witness whereof, the parties hereto have caused this contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA,
By RAY LYMAN WILBUR,
Secretary of the Interior.

Approved as to form,
W. B. MATHEWS,
General Counsel.

Attest:
S. H. FINLEY,
Secretary of the Board of
Directors.

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA,
By W. P. WHITSETT,
Chairman of the Board of
Directors.

(Corporate Seal)

POWER REGULATIONS.

I.

The United States will, at its own cost, construct in the main stream of the Colorado River at Black Canyon, a dam, creating thereby at the date of completion, a storage reservoir having a maximum water surface elevation at about twelve hundred twenty-two (1222) feet above sea level (U. S. Geological Survey datum) of a capacity of about twenty-nine million five hundred thousand (29,500,000) acre-feet. The United States will also construct in connection therewith outlet works, pressure tunnels, penstocks, power plant building, and furnish and install generating, transforming and high voltage switching equipment for the generation of the energy allocated to the various allottees respectively. Title to the Boulder Canyon Dam, reservoir, plant and incidental works, shall forever remain in the United States.

II.

The United States will operate and maintain the dam, reservoir, pressure tunnels, penstocks to but not inclusive of the shut-off valves at the inlets to the turbine casings, and outlet works, and will have full control of all water passing the dam for any and all purposes. The dam and reservoir will be operated and used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of the Colorado River Compact, and, third, for power.

III.

The United States will lease to the City of Los Angeles, referred to herein as the City, for fifty (50) years from the date at which energy is ready for delivery to the City, as announced by the Secretary, such power plant units and corresponding plant facilities and incidental structures as may be necessary to generate the energy allocated to it and energy for those allottees for whom the City is herein designated the generating agency, together with the right to generate such electrical energy.

The United States will lease to Southern California Edison Company, Ltd., referred to herein as the Company, such power plant units and corresponding plant facilities and incidental structures as may be necessary to generate the energy allocated to it and energy for those allottees for whom the Company is herein designated the generating agency, together with the right to generate such electrical energy, for a period beginning with the date at which the first of such power plant units is ready for operation and water is available therefor as announced by the Secretary, and ending at a time fifty (50) years from the date at which energy is ready for delivery to the City.

The machinery and equipment under lease to either lessee shall be operated and maintained by such lessee without interference from or control by the other lessee, but subject nevertheless to the supervisory authority of the Secretary or his representative, under the terms of the lease.

Subject to conditions hereinafter stated, the designation of generating agencies shall be as follows:

Generation of energy allocated to and used by the States of Nevada and Arizona shall be effected by the City.

Generation of energy allocated to Municipalities, shall be effected by the City.

Generation of energy allocated to the District shall be effected by the City.

Generation of energy allocated to the Companies shall be effected by Southern California Edison Company, Ltd.

The lessees and allottees may make other arrangements for generation, subject to the approval of the Secretary.

Disputes and disagreements between any allottee and the lessee generating energy for it, with respect to such generation, and/or the cost thereof, shall be determined by the Secretary unless otherwise specifically provided by contracts thereof with the Secretary.

All generation shall be effected at cost, except as provided in contracts with the United States.

IV.

The respective portions of the power plant and appurtenant structures shall be operated and maintained by the City and the Company, severally, under the supervision of a Director appointed by the Secretary. The City and the Company shall each be responsible for the operation and maintenance of that part of the power plant operated by it and shall bear the cost thereof. The United States will pay each lessee in the form of credits upon the account of such lessee for amounts due the United States under its contract, the cost incurred by it

in generating energy for other allottees for whom it is the designated generating agency, and will require such other allottees to repay such cost to the United States. Except as to off-peak power the term "cost" as used with reference to generating energy for other allottees, shall include a proper proportionate allowance for amortization of the amounts for which the respective lessees are obligated to the United States on account of use of machinery and equipment and interest on the respective lessees' prepayments thereof; a proper proportionate part of any annuity set up in accordance with regulations of the Secretary, and any additional expenditures made by the respective lessees with the approval of the Secretary for the purpose of meeting the obligation of the lessees to make replacements; and a proper proportionate part of the actual outlay of the lessees for operating such machinery and equipment and keeping the same in repair, including reasonable overhead charges. The extent of the allowance for the several items and the system of accounting therefor, shall be prescribed by the Secretary under uniform regulations to be promulgated by him in accordance with the Boulder Canyon Project Act. The United States will compensate each lessee for the generation by it of any secondary energy not taken by the District or the lessees in accordance with Article V hereof but disposed of by the United States, such compensation to cover the pro rata cost thereof as defined in this article (in proportion to the total kilowatt-hours generated in that month by each lessee), during the time said secondary energy was generated. Such secondary energy will be disposed of by the United States subject only to the prior right thereto of the District and/or the lessees.

The Director, among other powers, shall have authority to enforce rules and regulations promulgated by

the Secretary in accordance with the Boulder Canyon Project Act, respecting operation and maintenance of the power plant and appurtenant works and structures.

Prior to the promulgation of any additional regulations, or the change or modification of regulations, the Secretary shall give any lessee and any allottee affected thereby, an opportunity to be heard.

V.

The following allocation of energy is made: (the percentages stated being percentages of the total firm energy available) subject, however, to the conditions hereinafter stated:

A. To the State of Nevada, for use in Nevada, not exceeding eighteen per centum (18%) of said total firm energy.

B. To the State of Arizona, for use in Arizona not exceeding eighteen per centum (18%) of said total firm energy.

Should either of the States not take its full eighteen per centum (18%) allocation within a period of twenty (20) years hereof, the other may then contract for the energy not so taken up to four per centum (4%) of the total firm energy, provided that the combined amount used by the two states shall not, at any time, exceed thirty-six per centum (36%) of such total firm energy.

C. To the Metropolitan Water District of Southern California (hereinafter referred to as the District) so much energy as may be needed and used for pumping Colorado River Water into and

in its Aqueduct for the use of such District within the following limits:

(1) Not exceeding thirty-six per centum (36%) of said total firm energy; plus

(2) All secondary energy developed at the Boulder Dam power plant as provided in these regulations; plus

(3) So much of the firm energy allocated to the States, the City and the Company as may not be in use by them. Energy allocated to the States but not in use by them shall be released to the District by the two lessees equally (unless they agree upon a different ratio) as follows:

(a) If the District makes a firm contract with the Secretary for the balance of the lease period for part or all of such unused States energy (subject to the first right of the States thereto) such contract shall be made effective upon two years' written notice to the Secretary, and compensation to the lessees, respectively, for main transmission line property rendered idle;

(b) If the District does not so make a firm contract for such energy, then energy allocated to the States but not in use by them, shall be released to the District upon not less than fifteen (15) months' written notice to the Secretary and at such compensation as the District and such lessees, respectively, may agree upon, to cover cost and overhead of replacing energy which otherwise would have been received at the Pacific Coast end of the main transmission lines by the lessees, respectively. Such cost shall include interest on

and depreciation and operation and maintenance of the plant capacity while required for the generation of such substitute energy; and also appropriate allowance for interest on and maintenance and depreciation of plant capacity rendered idle because of cessation of generation of such substitute energy until such time as such plant capacity would otherwise have been installed by the lessees, respectively, for their own requirements. If the District and the respective lessees fail to agree on such compensation, such energy shall nevertheless be released to the District, and the disagreement shall be determined by arbitration or as may be provided in the respective contracts of the parties with the Secretary. Such determination shall include allowance for items of cost, and overhead as specified in this paragraph. Pending such determination, energy so released shall be paid for by the District at the rate for firm energy but the determination of compensation shall not be controlled by such rate. During any year beginning June first, the District shall not use any secondary energy nor any unused State energy, until it has first used subsequent to June first, next preceding, an amount of firm energy equivalent to one-twelfth of the amount of firm energy it is obligated to take and/or pay for annually multiplied by the number of months elapsed since June first next preceding.

(4) If, due to temporary deficiency in secondary energy regularly used by the District substitute energy is requested by the District in excess of the energy made available under the foregoing sub-paragraph (3) (b) the City and/or the

Company may release so much energy as may be practicable on the same terms as provided in subsection (3) (b) preceding.

D. To the municipalities of Anaheim, Beverly Hills, Burbank, Colton, Fullerton, Glendale, Newport Beach, Pasadena, Riverside, San Bernardino and Santa Ana, (referred to herein as "the municipalities"), six per centum (6%) in all, to be allocated among them as they may agree; but if no agreement is submitted to the Secretary on or before April 15, 1931, the Secretary shall determine the allocation of each.

E. To the City of Los Angeles, thirteen per centum (13%).

F. To Southern California Edison Company, Ltd., the Southern Sierras Power Company, the San Diego Consolidated Gas and Electric Company and the Los Angeles Gas and Electric Corporation, referred to herein as the companies, nine per centum (9%) in all, division whereof among the companies shall be made according to mutual agreement among them, if possible. If no such agreement is submitted to the Secretary on or before April 15, 1931, the Secretary shall determine the allocation of each.

The foregoing allocations are subject to the following conditions:

(i) So much of the energy allocated to the States (thirty-six per centum (36%) of the firm energy) and not in use by them, or failing their use, by the District for the above purpose, shall be

taken and paid for one-half by the City and one-half by the Company.

(ii) All of the energy allocated to the municipalities may be contracted for in compliance with these regulations by any one or more of them, as they may agree, on or before April 15, 1931. So much of the energy allocated to the municipalities as is not so contracted for, or, if contracted for, not used by them directly or under contract for municipal purposes and/or distribution to their inhabitants shall be taken and paid for by the City.

(iii) So much of the energy allocated to the Southern Sierras Power Company, the San Diego Consolidated Gas and Electric Company, and the Los Angeles Gas and Electric Corporation as is not firmly contracted for by them, severally, in compliance with these regulations on or before April 15, 1931, shall be taken and paid for by the Company.

(iv) If any allottee is permitted by the United States to divert water from the reservoir at a time when the reservoir is not spilling, in consequence of which the amount of energy which would have been utilized is diminished, such diminution, to such extent as may be provided in the contract, shall be debited to the allocation of firm energy herein made to such allottee; and charge for the energy equivalent of such diversion shall be made, and the amount of energy which the allottee shall otherwise be obligated to take and pay for hereunder shall be correspondingly reduced.

The reservoir shall be considered as spilling whenever water is being discharged in excess of the amount used for the generation of power, whether such waste occurs over the spillway or otherwise.

(v) Each of the States of Arizona and Nevada may, from time to time within the period of the aforesaid lease, contract for energy for use within such State in any amount until the total allocated respectively to each is in use as provided above; and may terminate such contract, or contracts, without prejudice to the right to again contract for such energy. All such contracts shall be executed with the Secretary. A contract requiring one thousand (1000) horsepower (of maximum demand) or less may become effective or be terminated on six months' written notice of requirement or termination given the Director by the State; provided, that the notice given shall be two years if in the twelve months preceding said notice of demand the total increment to such state has exceeded five thousand (5000) horsepower of maximum demand or if in the twelve months preceding said notice of termination the decrement to such state has exceeded five thousand (5000) horsepower of maximum demand. In all cases the Director shall immediately transmit such notice to each lessee. Whenever the amount in use is in excess of five thousand (5000) horsepower of maximum demand, the lessees respectively shall be compensated for property rendered idle by use of such excess in such amount as the Secretary shall determine to be equitable. Firm energy not contracted for by the States shall be available for use

by the District as herein elsewhere provided, and if not in use by the States and/or the District, shall be taken and paid for equally by the two lessees. No right which may be available to a State under section five (5) (c) of the Boulder Canyon Project Act to execute a firm contract for electrical energy for use within the State shall be impaired by any provision of the aforesaid lease or of any contracts with other parties; but if contract thereunder be executed by such State with the Secretary no provision of said lease shall apply for the benefit of such State. If in consequence of execution of such contract the Secretary requires the allocation to either lessee or to an allottee using such lessee's main transmission lines to be diminished, such lessee may terminate its rights and obligations hereunder within two months thereafter on written notice to the Secretary. Provided, further, that the combined allocation of nineteen per centum (19%) as herein made to the city and the municipalities shall not be reduced because of any such firm contract with a state for energy.

The District shall have the right to purchase and use all secondary energy as provided in these regulations for the purposes stated in the first paragraph of subdivision (c) of this article. The City and the Company shall each have the right to purchase and use one-half of all secondary energy not used by the District. Any such energy not used by one lessee shall be available, for the time being, to the other. If secondary energy is not taken by the City, the District, and/or the Company, then and in such event, the United

States reserves the right to take, use and dispose of such energy, from time to time, as it sees fit, giving credit therefor as provided in these regulations.

In the event the District shall fail for any reason to use all or any of the firm energy herein allotted to it for the only purpose for which said firm energy is allotted to it, that is, for pumping water into and in its aqueduct, then no disposition shall be made of such firm energy by the Secretary without first giving to a successor to the District which may undertake to build or maintain a Colorado River Aqueduct the opportunity to take said firm energy for the same purpose and under the same terms as those to which the District was obligated.

In the event no such successor takes said firm energy as provided above, then no disposition of such firm energy shall be made by the Secretary without first giving to each lessee the opportunity to contract on equal terms and conditions, to be prescribed by the Secretary, for one-half of such energy, together with such portion of the remainder as the other lessee shall not elect to take.

The United States reserves the right, in case the dam which it erects provides a maximum water surface elevation in excess of one thousand two hundred twenty-two (1222) feet above sea level (U. S. Geological Survey datum), and thereby increases the quantity of firm energy above the quantity of four billion two hundred forty million (4,240,000,000) kilowatt-hours allocated above, to dispose of such increase, but not to exceed ninety million (90,000,000) kilowatt-hours per year (June 1st to

May 31st, inclusive) to any municipality or municipalities by firm contract executed with the Secretary on or before April 15, 1931. Such disposition shall be without prejudice to any provision of said lease or of the allocation above referred to. So much of such additional energy as is not so contracted for shall be taken and paid for by the City. Generation of such additional energy shall in any event be effected by the City.

VI.

Contractors hereunder shall agree as follows:

(1) To pay the United States for the use of falling water for the generation of energy for their own use, respectively, by the equipment leased hereunder, as follows:

(a) One and sixty-three hundredths mills ($0.00163) per kilowatt-hour, (delivered at transmission voltage) for firm energy;

(b) One-half mill ($0.0005) per kilowatt-hour, (delivered at transmission voltage) for secondary energy;

(2) The lessees of the power plant shall compensate the United States for the use of leased equipment as herein elsewhere provided;

(3) The lessees shall also maintain said equipment in first-class operating condition, including repairs to and replacements of machinery;

(4) Allottees other than the lessees shall pay the United States, for credit to the lessees, on account of use of the leased equipment.

(5) Allottees other than the lessees shall pay the United States, for credit to the lessees, on ac-

count of maintenance of said equipment, including repairs to and replacements of machinery, provided however, that, if the expenditures for replacements shall exceed at any time the sum accumulated by the lessees as a depreciation reserve in accordance with rules and regulations prescribed by the Secretary, pursuant to the Boulder Canyon Project Act, less all amounts previously withdrawn for replacements, then the rates aforesaid shall be readjusted as hereinafter provided so as to reimburse the said lessees severally for such excess expenditures within the term of said lease.

All energy shall be measured at generator voltage and suitable metering equipment shall be provided and installed by the United States for this purpose. Suitable correction shall be made in the amounts of energy as measured at generator voltage to cover step-up transformer losses and energy required for operation of station auxiliaries, in determining the amounts of energy delivered at transmission voltage as provided in these regulations.

At the end of fifteen (15) years from the date of execution of lease and every ten (10) years thereafter, the above rates of payment for firm and secondary energy shall be readjusted upon demand of any party thereto, either upward or downward as to price, as the Secretary may find to be justified by competitive conditions at distributing points or competitive centers.

The rate for falling water for generation of firm energy, which shall be uniform for all lessees, provided for by any such readjustment shall be arrived at by deducting from the price of electrical energy justified by

competitive conditions at distributing points or competitive centers,—(1) all fixed and operating costs as provided for herein of transmission to such points,—(2) all fixed and operating costs of such portion of the power plant machinery as is to be operated and maintained by the several lessees, including the costs of repairs and replacements, together with readjustment as to replacements as is provided for in paragraph five (5) above; it being understood that such readjusted rates shall under no circumstances exceed the value of said energy, based upon competitive conditions at distributing points or competitive centers.

If the lessees or either of them shall not obtain a renewal of said lease at the expiration of the contract period, equitable adjustment for major replacements of machinery made between the date of the last readjustment of rates and the end of the contract period shall be made at the expiration of the lease.

VII.

The amount of firm energy for the first year of operation, (June 1 to May 31, inclusive) following the date of the completion of the dam as announced by the Secretary shall be defined as being four billion two hundred forty million (4,240,000,000) kilowatt-hours. For every subsequent year the amount defined as firm energy shall be decreased by eight million seven hundred sixty thousand (8,760,000) kilowatt-hours from that of the previous year.

Nevertheless, if it be determined by the Secretary that the rate of decrease of kilowatt-hours per year as above stated, is not in accord with actual conditions, the

Secretary reserves the right to fix a lesser rate for any year (June 1st to May 31st, inclusive) in advance.

If the dam erected by the United States provides a maximum water surface elevation in excess of 1222 feet above sea level (U. S. Geological Survey datum), the United States reserves the right to dispose of additional firm energy thereby made available, not to exceed ninety million (90,000,000) kilowatt-hours per year, subject to pro rata of the eight million seven hundred sixty thousand (8,760,000) kilowatt-hours annual diminution above provided for.

The term "secondary energy" wherever used herein shall mean all electrical energy generated in one year (June 1st to May 31st, inclusive) in excess of the amount of firm energy as hereinabove defined, available in such year.

VIII.

The contractors shall pay monthly for all energy in accordance with the rates established or provided for herein. When energy taken in any month is not in excess of one-twelfth (1/12) of the minimum annual obligation, bill for such month shall be computed at the rate for firm energy in effect when such energy was taken on the basis of the actual amount of energy used during such month. All energy used during any month in excess of one-twelfth (1/12) of the minimum annual obligation shall be paid for at the rate for secondary energy in effect when such energy was taken; provided, however, that the secondary rate shall not apply to any energy taken during any month unless and until an amount of energy equivalent to one-twelfth 1/12 of the minimum annual obligation has been taken for all months beginning with the month of June immediately preceding; pro-

vided, however, that the bill for the month of May shall not be less than the difference between the minimum annual payment, and the sum of the amounts charged for firm energy during the preceding eleven (11) months. The United States will submit bills to all contractors by the fifth of each month immediately following the month during which the energy is generated, and payments shall be due on the first day of the month immediately succeeding. If such charges (less, in bills to lessees, credit allowances due lessees for generation for other allottees) are not paid when due, a penalty of one per centum (1%) of the amount unpaid shall be added thereto, and thereafter an additional penalty of one per centum (1%) of the amount unpaid shall be added on the first day of each calendar month thereafter during such delinquency.

IX.

The total payments made by each contractor for firm energy available in any year (June 1st to May 31st, inclusive), whether any energy is generated or not, exclusive of its payments for use of machinery, shall not be less than the number of kilowatt-hours of firm energy available to said contractor and which said contractor is obligated to take and/or pay for during said year, multiplied by one and sixty-three hundredths mills ($0.00163), or multiplied by the adjusted rate of payment for firm energy in case the said rate is adjusted as provided in article VI hereof, less credits on account of charges to other allottees, as provided for and referred to in article IV hereof. For a fractional year at the beginning or end of the contract period, the minimum annual payment for firm energy shall be proportionately adjusted in the ratio that the number of days water is available for generation of energy in such fractional year bears to three hundred

sixty-five (365). Provided, however, that in order to afford a reasonable time for the respective lessees to absorb the energy contracted for, the minimum annual payments by each for the first three (3) years after energy is ready for delivery to such lessees, respectively, as announced by the Secretary, shall be as follows, in percentages of the ultimate annual obligation, to take and/or pay for firm energy:

1st Year, 55%
2nd Year, 70%
3rd Year, 85%
4th Year and all
subsequent Years, 100%

During said absorption period, if the quantity of energy taken in any one year (June 1st to May 31st, inclusive), is in excess of the above percentages of the ultimate obligation during such year to take and/or pay for firm energy, such excess shall be paid for at the rate for secondary energy. Provided, further, that the minimum annual payment shall be reduced in case of interruptions or curtailment of delivery of water as provided in paragraph X hereof.

X.

The United States will deliver water continuously to each lessee in the quantity, in the manner, and at the times necessary for the generation of the energy which each of said lessees has the right and/or obligation to generate under its contract in accordance with the load requirements of each of said lessees and of allottees for which the respective lessees are generating agencies, excepting only that such delivery shall be regulated so as not to interfere with the necessary use of said Boulder

Canyon Dam and Reservoir for river regulation, improvement of navigation, flood control, irrigation, or domestic uses, and the satisfaction of present perfected rights in or to the waters of the Colorado River, or its tributaries, in pursuance of article VIII of the Colorado River Compact. The United States reserves the right temporarily to discontinue or reduce the delivery of water for the generation of energy at any time for the purposes of maintenance, repairs and/or replacements, or installation of equipment, and for investigations and inspections necessary thereto; provided, however, that the United States shall, except in case of emergency, give to the lessees reasonable notice in advance of such temporary discontinuance or reduction, and that the United States shall make such inspections and perform such maintenance and repair work after consultation with the lessees at such times and in such manner as will cause the least inconvenience to the lessees and the allottees, and shall prosecute such work with diligence, and, without unnecessary delay, will resume delivery of water so discontinued or reduced. Should the delivery of water be discontinued or reduced below the amount required, severally, for the normal generation of firm energy for the payment of which the contractor obligates itself, the total number of hours of such discontinuance or reduction in any year shall be determined by taking the sum of the number of hours during which the delivery of water is totally discontinued, and the product of the number of hours during which the delivery of water is partially reduced and the percentage of said partial reduction below the actual quantity of water required for the normal generation of firm energy. Total or partial reductions in delivery of water which do not reduce the power output below the amount required at the time for the normal generation of

firm energy, will not be considered in determining the total hours of discontinuance in any year. The minimum annual payment shall be reduced by the ratio that the total number of hours of such discontinuance bears to eight thousand seven hundred sixty (8760). In no event shall any liability accrue against the United States, its officers, agents and/or employees, for any damage, direct or indirect, arising on account of drought, hostile diversion, act of God, or of the public enemy, or other similar cause.

Each lessee shall make full and complete written monthly reports as directed by the Secretary, on forms to be supplied by the United States, of all electrical energy generated by it, and the disposition thereof to allottees. Such reports shall be made and delivered to the Director on the third day of the month immediately succeeding the month in which the electrical energy is generated, and the records and data from which such reports are made shall be accessible to the United States on demand of the Secretary.

XI.

Any agency receiving a contract for electrical energy equivalent to one hundred thousand (100,000) firm horsepower, or more, may when deemed feasible by the Secretary, from engineering and economic considerations and under general regulations prescribed by him, be required to permit any other agency having contracts for less than the equivalent of twenty-five thousand (25,000) firm horsepower, upon application to the Secretary made within sixty (60) days from the execution of the contract of the agency the use of whose transmission line is applied for, to participate in the benefits and use of any main transmission line constructed or to be con-

structed by the former for carrying such energy (not exceeding, however, one-fourth (¼) the capacity of such line), upon payment by such other agencies of a reasonable share of the cost of construction, operation and maintenance thereof.

XII.

The use is authorized of such public and reserved lands of the United States as may be necessary or convenient for the construction, operation and maintenance of main transmission lines, to transmit electrical energy generated at Boulder Canyon Dam, together with the use of such public and reserved lands of the United States as may be designated by the Secretary, from time to time, for camp sites, residences for employees, warehouses and other uses incident to the operation and maintenance of the power plant and incidental works.

XIII.

The Secretary, or his representatives, shall at all times have the right of ingress to and egress from all works of the contractors for power or power privileges, for the purpose of inspection, repairs and maintenance of works of the United States, and for all other proper purposes. The Secretary or his representatives shall also have free access at all reasonable times to the books and records of contractors for power or power privileges, relating to the generation, transmission, and disposition of electrical energy with the right at any time during office hours to make copies of or from the same.

XIV.

All patents, grants, contracts, concessions, leases, permits, licenses, rights of way, or other privileges from

the United States or under its authority, necessary or convenient for the use of waters of the Colorado River or its tributaries, or for the generation or transmission of electrical energy generated by means of the waters of said river or its tributaries, whether under the Boulder Dam Project Act, the Federal Water Power Act, or otherwise, shall be upon the express condition and with the express covenant that the rights of the recipients or holders thereof to waters of the river or its tributaries, for the use of which the same are necessary, convenient, or incidental, and the use of the same shall likewise be subject to and controlled by said Colorado River Compact.

XV.

All contracts for purchase of energy available at Boulder Canyon Dam shall be made directly with the United States.

XVI.

No contract for electrical energy or for generation of electrical energy shall be of longer duration than fifty (50) years from the date at which such energy is ready for delivery as announced by the Secretary.

XVII.

The holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulation, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased or acquired and such holder be compensated for damages to its property, used and useful in the transmission and

distribution of such electrical energy and not taken, resulting from the termination of the supply.

XVIII.

All contracts shall be subject to these, and such other rules and regulations conforming to the Boulder Canyon Project Act as the Secretary may from time to time promulgate; provided, however, that no right under any contract then existing shall be impaired or obligation thereunder be extended thereby; and provided further that opportunity for hearing shall be afforded such contractors by the Secretary prior to modification or repeal thereof or promulgation of additional regulations.

Washington, D. C.
April 25, 1930.

RAY LYMAN WILBUR,
Secretary of the Interior.

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FILED
JAN 12 1931
CHARLES ELMORE CROPLEY
CLERK

No. 19, Original.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

STATE OF ARIZONA, *Complainant*,

v.

STATE OF CALIFORNIA, STATE OF NEVADA, STATE OF UTAH, STATE OF NEW MEXICO, STATE OF COLORADO, STATE OF WYOMING, AND RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, *Defendants*.

MOTION TO DISMISS.

W. B. MATHEWS,
CHARLES L. CHILDERS,
Of Counsel for California.

U. S. WEBB,
Attorney General of California.

GRAY MASHBURN,
Attorney General of Nevada.

WILLIAM W. RAY,
Of Counsel for Utah.

GEORGE P. PARKER,
Attorney General of Utah.

FRANCIS C. WILSON,
Of Counsel for New Mexico.

E. K. NEUMANN,
Attorney Gen. of New Mexico.

DELPH E. CARPENTER,
THOMAS H. GIBSON,
L. WARD BANNISTER,
CLARENCE L. IRELAND,
Of Counsel for Colorado.

JOHN S. UNDERWOOD,
Attorney General of Colorado.

WILLIAM O. WILSON,
Of Counsel for Wyoming.

JAMES A. GREENWOOD,
Attorney General of Wyoming.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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MOTION TO DISMISS.

Now come the States of California, Nevada, Utah, New Mexico, Colorado and Wyoming, by the Attorney General of each State, and move, jointly and severally, that the bill of complaint be dismissed, for the reasons:

I.

This Honorable Court is without jurisdiction of the subject matter of the bill of complaint, for the reason that the same does not present for adjudication any case or controversy of which the Court can take judicial cognizance.

II.

The bill of complaint does not join the United States, which is an indispensable party to this suit.

III.

The bill of complaint does not state facts sufficient to constitute a cause of action against the said defendants or either or any of them.

U. S. WEBB,
Attorney General of California.

W. B. MATHEWS,
CHARLES L. CHILDERS,
Of Counsel for California.

GRAY MASHBURN,
Attorney General of Nevada.

GEORGE P. PARKER,
Attorney General of Utah.

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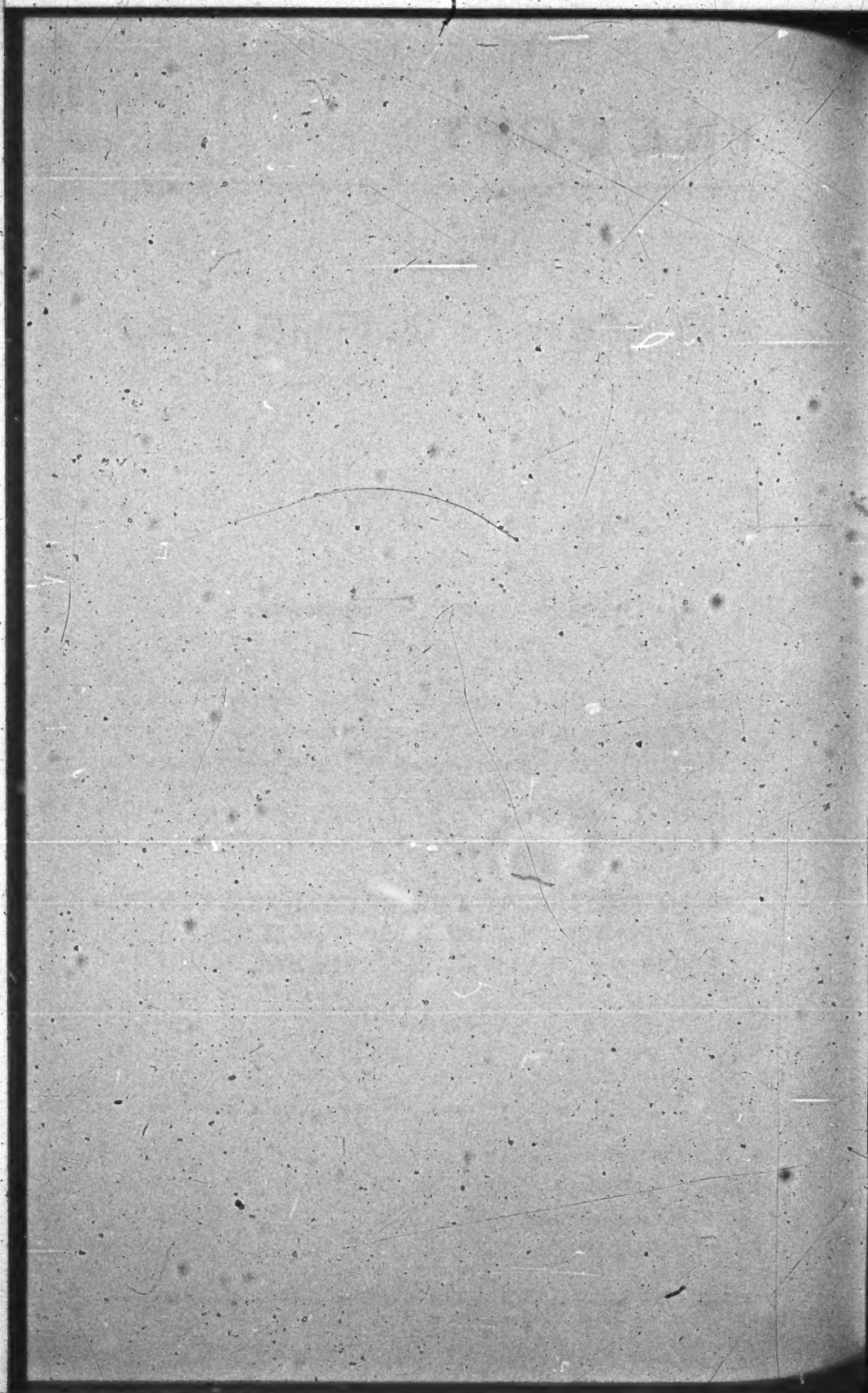
COPY OF MOTION BY THE DEFENDANT STATES TO DISMISS THE BILL OF COMPLAINT, AND BRIEF OF STATE OF CALIFORNIA.

U. S. WEBB,
Attorney General of California.

W. B. MATHEWS,
CHAS. L. CHILDERS,
Of Counsel for California.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



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MOTION BY THE DEFENDANT STATES TO DISMISS THE BILL OF COMPLAINT.

Now come the States of California, Nevada, Utah, New Mexico, Colorado and Wyoming, by the Attorney General of each State, and move, jointly and severally, that the bill of complaint be dismissed, for the reasons:

I.

This Honorable Court is without jurisdiction of the subject matter of the bill of complaint, for the reason that the same does not present for adjudication any case or controversy of which the Court can take judicial cognizance.

II.

The bill of complaint does not join the United States, which is an indispensable party to this suit.

III.

The bill of complaint does not state facts sufficient to constitute a cause of action against the said defendants or either or any of them.

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ON MOTION OF DEFENDANTS, STATE OF CALIFORNIA, STATE OF NEVADA, STATE OF UTAH, STATE OF NEW MEXICO, STATE OF COLORADO, AND STATE OF WYOMING.

BRIEF FOR DEFENDANT STATE OF CALIFORNIA.

Defendant State of California, appearing by its Attorney General, has joined with defendants State of Nevada, State of Utah, State of New Mexico, State of Colorado, and State of Wyoming, in a motion to dismiss the bill of complaint herein on the following grounds:

I.

This Honorable Court is without jurisdiction of the subject matter of the bill of complaint, for the reason that the same does not present for adjudication any case or controversy of which the Court can take judicial cognizance.

II.

The bill of complaint does not join the United States, which is an indispensable party to this suit.

III.

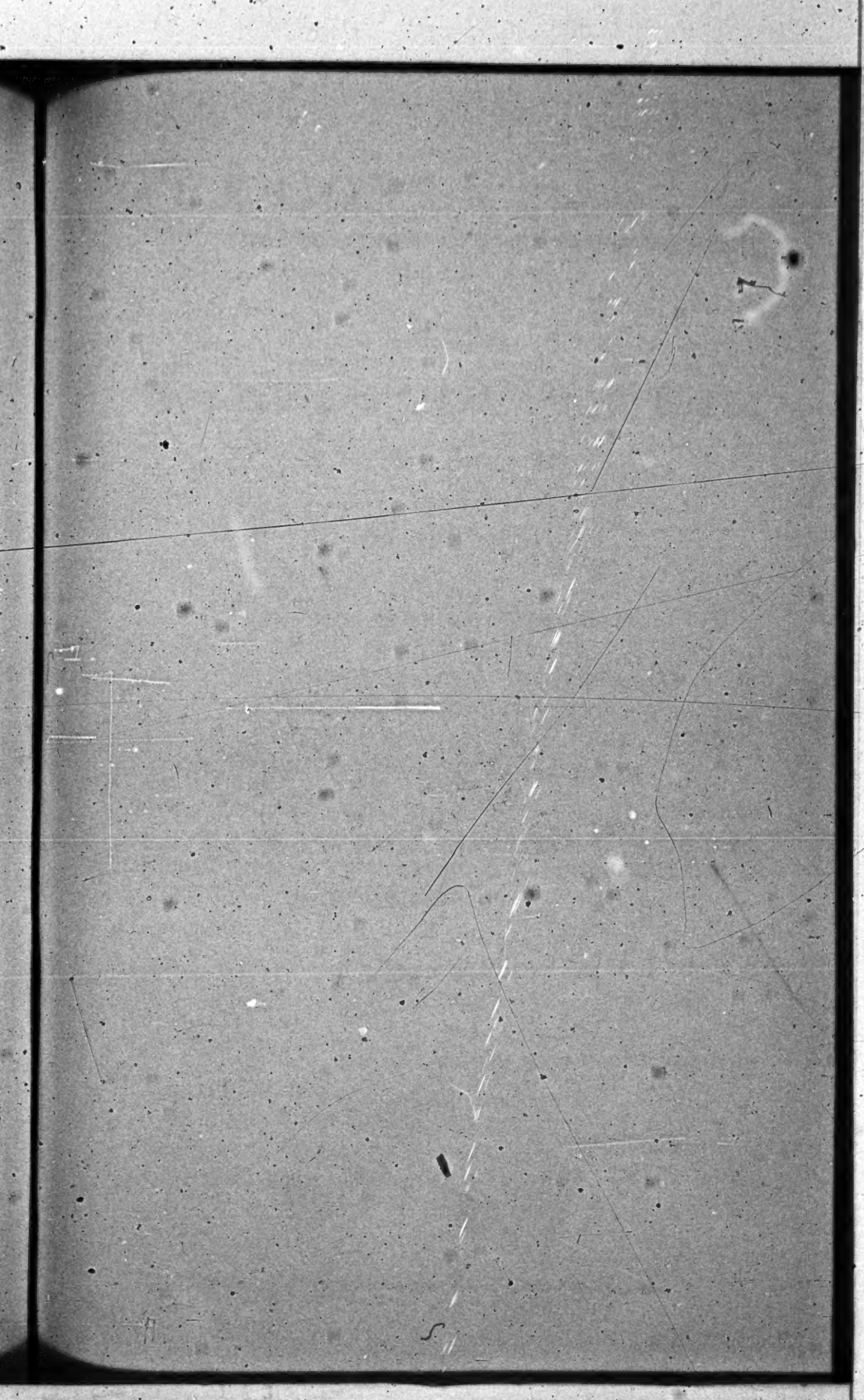
The bill of complaint does not state facts sufficient to constitute a cause of action against the said defendants, or either or any of them.

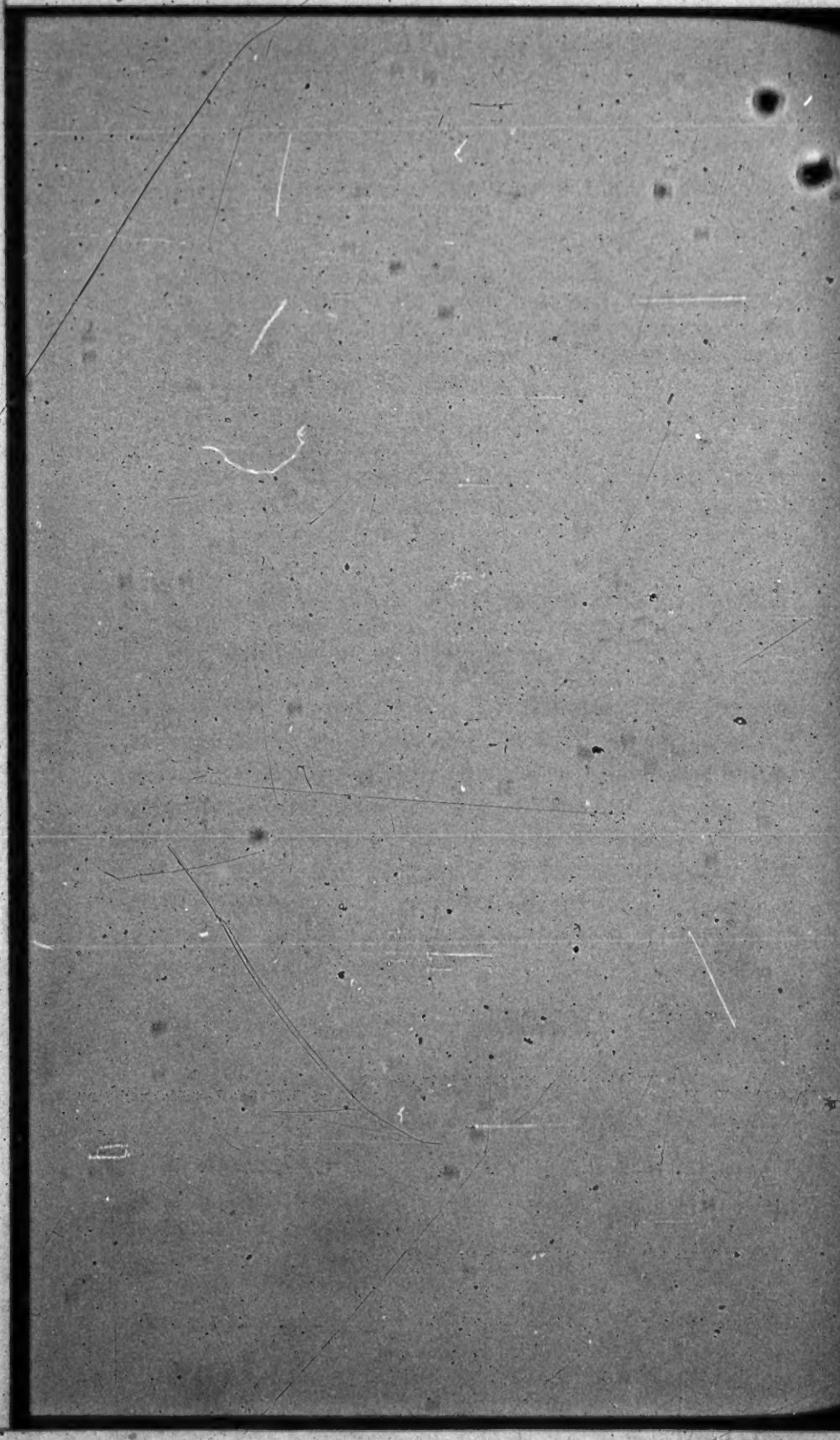
The reasons urged by this defendant and the authorities supporting the same are set forth in the brief of the Honorable the Solicitor General of the United States in support of the motion to dismiss the bill of complaint filed by the defendant Ray Lyman Wilbur, Secretary of the Interior, and such brief is, by permission of the Solicitor General and by reference thereto, adopted as the brief of this defendant, in support of its motion to dismiss the bill of complaint.

Respectfully submitted,

U. S. WEBB,
Attorney General of California.

W. B. MATHEWS,
CHAS. L. CHILDERS,
Of Counsel for California.





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MOTION BY THE DEFENDANT STATES TO DISMISS THE BILL OF COMPLAINT, AND BRIEF OF STATES OF UTAH AND WYOMING.

GEORGE P. PARKER,
Attorney General of Utah.
JAMES A. GREENWOOD,
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Of Counsel for Utah.
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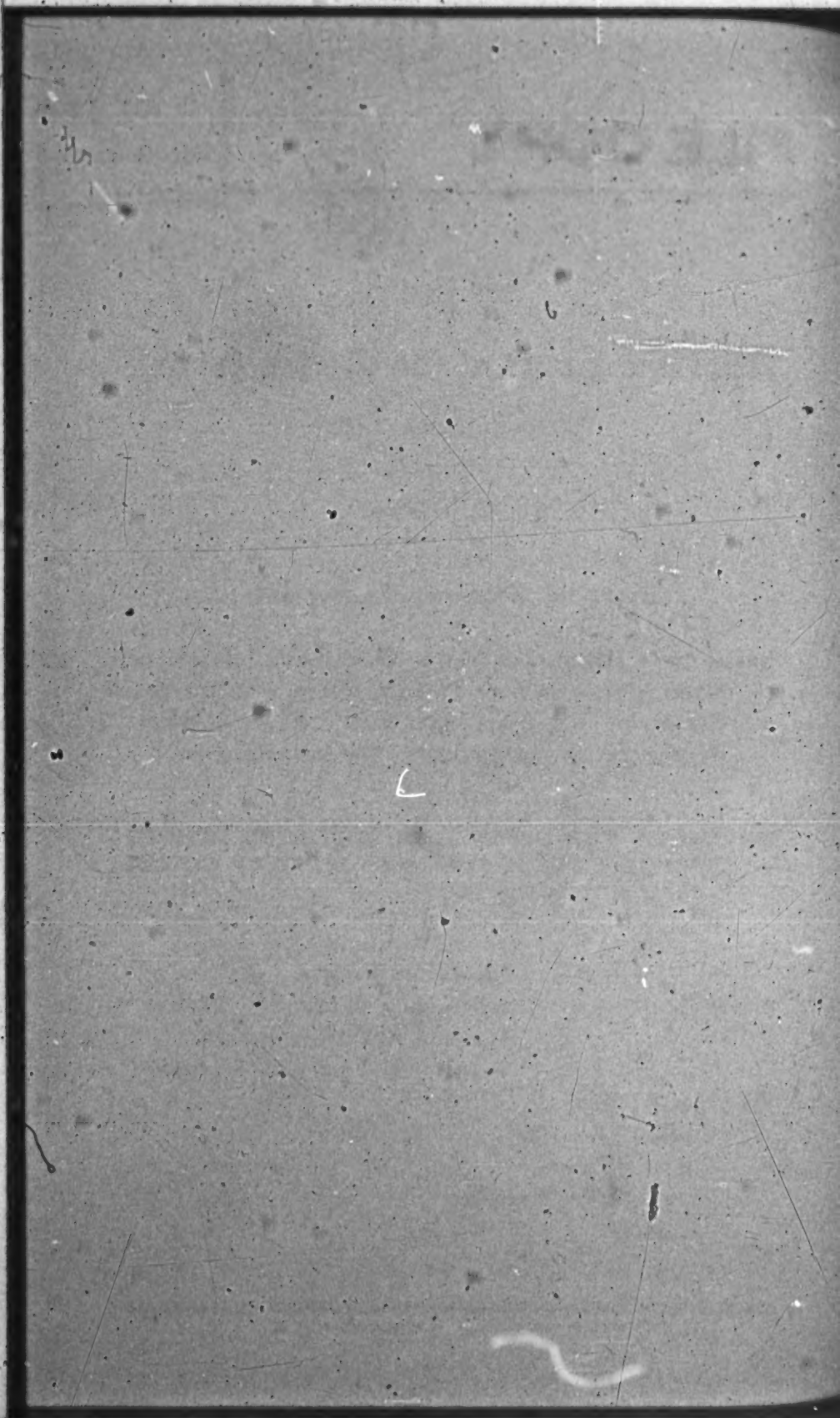

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Attorney General of Wyoming.

WILLIAM O. WILSON,
Of Counsel for Wyoming.

BRIEF OF STATES OF UTAH AND WYOMING IN SUPPORT OF MOTION.

Statement.

The plaintiff's bill of complaint in this action is brought to have declared unconstitutional the Colorado River Compact, attached to the bill of complaint, page 50, and the Boulder Canyon Project Act attached to the complaint, page 58.

The Colorado River Compact is an agreement, made in accordance with the provision of the Federal Constitution, between the States of Colorado, Nevada, Utah, Wyoming, California and New Mexico. In addition to said States, Arizona by legislative act, had resolved to enter into a compact. Its representative was a member of and took part in the conference which formulated the compact and signed the same on behalf of Arizona. However, that State never ratified it. The compact as formulated and signed by the States was approved and ratified by the Congress of the United States in the passage of the Boulder Canyon Project Act. The compact itself deals exclusively with a division between the compacting States of the waters of the Colorado River and its tributaries. Article 1 of the compact sets forth the purposes of the agreement, Article 2 the definitions of the terms used in the Act, Article 3 is an allocation of waters between the compacting States and a regulation of the conditions of its use. Article 4 is a stipulation between the parties to the effect that with the approval of the Federal government the Colorado River shall be deemed a non-navigable stream in so far as the right to devote the waters of the river to the purposes of the compact is concerned. Article

5 sets up a commission to study and report upon the flow of the river. Article 6 provides a method for the settlement of controversies between the parties to the compact as to the subject-matter covered by the compact. Article 7 preserves to the United States its right to discharge its obligations to Indian Tribes in respect to the waters of the river. Article 8 protects all vested rights to the use of the waters of the river. Article 9 permits the States to resort to the courts to enforce their rights as fixed under the compact. Article 10 fixes terms under which the compact may be terminated, and Article 11 provides the method of approval of the compact.

Upon the execution of the compact by the six States, the Congress of the United States approved and ratified the same by the passage of the Boulder Canyon Project Act, and further provided for impounding of the waters of the river and the devoting of the waters so impounded to the purposes of the compact. Arizona is not a party to the compact and the compacting States do not contend that the compact undertakes or pretends to or could make any disposition of or affect the rights of the State of Arizona to the waters of the Colorado River or restrain that State in its appropriation and use of such waters as fully as said State would be entitled to appropriate and use such water in the absence of the compact.

The Boulder Canyon Project Act is not the creation of all or any of the compacting States, but is an act of the Federal government. Under the provisions and mandate of this act the Secretary of the Interior, a Federal officer, is alleged to be proceeding to enter the State of Arizona and there build a dam across the

channel of the Colorado River, which dam when constructed will impound within the limits of the States of Arizona and Nevada substantially thirty million acre-feet of water. The act provides for the construction of said dam, the impounding of said waters, the generating of power in connection with said dam, and the distribution of the water so impounded.

It is not charged in the bill that any of the States have entered or are threatening to enter the State of Arizona, that they or any of them are constructing or threatening to place any structures in the State of Arizona, or that either Utah or Wyoming is using or threatening to use any of the waters impounded in the reservoir, or in any way to restrain the use thereof by the State of Arizona.

Only two allegations in the bill complain of the conduct of the States. First, that the representatives of these States are counselling with the Secretary of the Interior relative to the carrying out of the provisions of the Boulder Canyon Project Act. There is no allegation that said counsel is being followed or that it is resulting in any damage or injury whatsoever to the State of Arizona. The carrying out of the provisions of the Boulder Canyon Project Act is committed exclusively to the defendant Secretary of the Interior. It is true that under the provisions of said act the Secretary of the Interior may consult with representatives of the several States. He is not required so to do and his action is in no way bound by the counsel of the representatives of said States. There is no allegation that any act complained of in the bill is the result of any conference had by the Secretary of the Interior with the representatives of any of said States. Second, that the compacting

States claim some contingent remote and undefined interest in the contracts referred to in the bill of complaint for the sale of power. Arizona claims no interest whatsoever in the proceeds of such contracts. Under the terms of the bill there is no certainty that there will be any proceeds from said contract for a period of fifty years. Until there are proceeds therefrom and Arizona asserts an interest therein contrary to the alleged claims of these States, there is no controversy between these States and the State of Arizona for any court to adjudicate.

The States which are parties signatory to the Colorado River Compact have the right, with the consent and approval of the Federal government to enter into compact as to the property in which they have either a joint or several interest, and Arizona cannot lawfully complain against the exercise of such right.

Storage, Diversion, Delivery and Use of Water Controlled by the Compact.

Notwithstanding the fact that the Act in section 5 thereof, authorizes the Secretary of the Interior, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon for irrigation and domestic purposes and for the generation of electrical energy, upon charges that will, in connection with other revenue, cover expenses of operation and maintenance incurred by the United States under said Act; that contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of the act; and no person shall have or be entitled

to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated, all of the powers thus conferred are carefully restricted.

The plaintiff in its complaint alleges in paragraph XXI thereof, among other things, that the effect of said act, referring particularly to said section 5, would be to withdraw from appropriation all of the water now flowing in the Colorado River, all of which is now subject to appropriation in Arizona; to prohibit the appropriaton of said water; and to prohibit the use thereof except by contract with the Secretary of the Interior.

This fear of the complainant might be well founded were it not the fact that the terms of the Act are subordinate to the terms of the Compact and provisions of the act which leave the matters of storage, division, delivery and use of water, as provided for in the Colorado River Compact, to the jurisdiction of such compact and not to the said act, as follows:

(1) Sec. 8 (a). The United States, its permittees, licensees and contractees, and all users and appropriators of water stored, diverted, carried and/or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by the said Colorado River Compact in the construction, management and operation of said reservoir, canals, and other works; and the storage, diversion, delivery and use of water for the generation of power, irrigation and other purposes, anything in said Act to the contrary notwithstanding, and all permits, licenses and contracts shall so provide.

(2) Sec. 13 (b). The rights of the United States in or to waters of the Colorado River and its tributaries howsoever claimed or acquired, as well as the

rights of those claiming under the United States, shall be subject to said Colorado River Compact.

(3) Sec. 18. Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of the waters within their borders, except as modified by Colorado River Compact or other interstate agreement.

While, therefore, under said section 5 there would seem to be no limitation on the right of the Secretary to sell such water, there are nevertheless the limitations in said sections above in this paragraph set forth, which bind to the Colorado River Compact the officers administering the act, the United States and permittees, appropriators and users of water, in the storage, diversion, delivery and use of waters in the River and tributaries; and which recognize the rights of those claiming under the United States as being subject to the said Colorado River Compact; and which also prevent any interference with the rights of the States to the waters within their respective borders, and to enact such policies and adopt such laws which they may deem necessary with respect to the appropriation, control and use of the waters within their borders except as modified by the said Colorado River Compact or other interstate agreement.

Argument.

The State of Arizona alleges in its bill that it has not approved the Colorado River Compact. (Complaint, par. 14, page 19.) The action of the United States and the six approving states did not and could

not affect the sovereignty of the State of Arizona (*Stearns vs. Minnesota*, 179 U. S. 223, 244 and 245) nor make that State a party to the compact, and was without prejudice to the rights of that state, so far as the compact was concerned, which it now has or hereafter could obtain to the waters of the Colorado River. Therefore, the State of Arizona is not in a position to question the validity of the compact, assert that the compact is unconstitutional or invoke the jurisdiction of this court for its construction.

The States have power to enter into compacts or agreements with other states or with the United States.

Poole vs. Fleeger, 11 Pet. 185, 209-210; Lb. (Baldwin, J.) Appendix to 11 Pet. 170a, 174-176;
Rhode Island v. Massachusetts, 12 Pet. 657, 725-731;
Stearns vs. Minnesota, 179 U. S. 223, 245;
Virginia vs. Tennessee, 148 U. S. 503;
Holmes vs. Jennisen, 14 Pet. 540, 570;
Washington vs. Oregon, 214 U. S. 205, 218;
United States vs. Texas, 143 U. S. 621, 646, 162 U. S. 1.

Art. 1, Sec. 10, par. 3 of the Federal Constitution provides:

> "No State shall without consent of Congress * * * enter into any agreement or compact with another State."

Such consent having been obtained, the States are, "in this respect restored to their original inherent sovereignty; such consent being the sole limitation imposed by the Constitution, when given, left the

States as they were before * * * whereby their compacts became of binding force * * * operating with the same effect as a treaty between sovereign powers" and "become exclusive upon all the subjects and citizens thereof, and bind their rights." *Rhode Island vs. Massachusetts*, 12 Pet. 657, 725.

Consent of Congress may be obtained either before or after conclusion of the compact and may be express or implied.

Wharton vs. Wise, 153 U. S. 155, 168, 159;
Virginia vs. Tennessee, 148 U. S. 503, 521, 525;
Virginia vs. West Virginia, 11 Wall. 39;
Penn vs. Wheeling, etc. Co., 13 How. 518;
Rhode Island vs. Massachusetts, 12 Pet. 657, 725;
Poole vs. Fleeger, 11 Pet. 185, 209-210; Lb. (Baldwin, J.) Appendix to 11 Pet. 170a, 174-176;
Green vs. Biddle, 8 Wheat. 1, 86.

The compact involves subject matter within the jurisdiction of the contracting States, and a valid and constitutional exercise of their sovereignty.

Wyoming v. Colorado, 259 U. S. 419;
Hudson Water Co. v. McCarter, 209 U. S. 349, 354-357; 70 N. J. Eq. 695, 717.
Kansas v. Colorado, 185 U. S. 125; 206 U. S. 46;
Georgia v. Tennessee Copper Co., 206 U. S. 230, 237-238;
Richey etc. Co. v. Miller & Lux, 218 U. S. 258;
Missouri v. Illinois, 180 U. S. 208; 200 U. S. 496;
Cutierres v. Albuquerque L. & L. Co., 188 U. S. 545, 552, 553;
Shively v. Bowlby, 152 U. S. 1;

The Act of Congress (42 Stat. 171) consents that the Colorado River States may "negotiate and enter into a compact or agreement * * * providing for an equitable division and apportionment among said States of the water supply of the Colorado River and of the streams tributary thereto."

The compact binds the United States, its rights "in or to the waters of the Colorado River and its tributaries", and its property within the Colorado River drainage. See Sec. 13, par. b, c, and d, Boulder Canyon Project Act (Bill 75). It binds and is conclusive upon the six approving States, their citizens and inhabitants and their rights and property within the Colorado River Basin. *Rhode Island v. Massachusetts*, 12 Pet. 657, 725; *Kansas v. Colorado*, 206 U. S. 46, 98; *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237-238; *Richey & Co. v. Miller & Lux*, 218 U. S. 258, 281; *Virginia v. Tennessee*, 148 U. S. 503, 525.

Under the foregoing decisions of this Court, the States in question made a valid compact as to a subject matter upon which they had the right to contract. The providence or improvidence of such compact is no concern of a State not a party thereto. The complaint in this case alleges the non-navigability of the Colorado River. If such allegation is aptly made, this motion admits that fact for the purpose of the motion. If the Colorado River is a non-navigable stream, then it does not have impressed upon it the paramount power of the United States to control the waters of such river for the purpose of navigation and the States through which it runs may make such division of that water as may be consistent with their title thereto. The situation might be otherwise if the non-

navigability of the Colorado River had not been fixed by the compact. In the absence of such compact and the consent thereto of the Federal government, the States might not have been empowered to enter into a contract to divide up between themselves the waters of a navigable stream, because such waters would, if navigable, have been impressed with the power of the United States to maintain them for the purpose of commerce.

The States are not necessary parties for the determination of the question as to whether Congress has exceeded its authority in the Boulder Canyon Project Act, and they are not even proper parties in a controversy to determine that question.

Respectfully submitted,

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CHARLES ELMORE

No. 12, Original.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

STATE OF ARIZONA, *Complainant*,

v.

STATE OF CALIFORNIA, STATE OF NEVADA, STATE OF UTAH, STATE OF NEW MEXICO, STATE OF COLORADO, STATE OF WYOMING, AND RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, *Defendants*.

MOTION BY DEFENDANT STATES TO DISMISS THE BILL OF COMPLAINT, AND BRIEF OF THE STATES OF COLORADO, NEW MEXICO AND NEVADA IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 19 Original.

STATE OF ARIZONA, *Complainant*,

v.

STATE OF CALIFORNIA, STATE OF NEVADA, STATE OF UTAH, STATE OF NEW MEXICO, STATE OF COLORADO, STATE OF WYOMING, AND RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, *Defendants*.

MOTION BY THE DEFENDANTS TO DISMISS THE BILL OF COMPLAINT.

Now come the States of California, Nevada, Utah, New Mexico, Colorado and Wyoming, by the Attorney General of each State, and move, jointly and severally, that the bill of complaint be dismissed, for the reasons:

I.

This Honorable Court is without jurisdiction of the subject matter of the bill of complaint, for the reason that the same does not present for adjudication any case or controversy of which the Court can take judicial cognizance.

II.

The bill of complaint does not join the United States, which is an indispensable party to this suit.

III.

The bill of complaint does not state facts sufficient to constitute a cause of action against the said defendants or either or any of them.

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BRIEF OF THE STATES OF COLORADO, NEW MEXICO AND NEVADA IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT.

State of the Pleadings.

Upon leave granted, the State of Arizona filed in this Court an original bill of complaint against the six other States of the Colorado River Basin and the Secretary of the Interior of the United States. On November 24, 1930, process was made returnable on January 12, 1931. All of the defendants have moved to dismiss the complaint.

Questions Presented.

1. Does the United States Supreme Court have jurisdiction of the subject-matter of this suit?

2. Is any cause of action within the jurisdiction of this Court alleged against the defendant States, or any of them?

Statement.

The bill asks this Court to decree that each and every provision of the Colorado River Compact and of the Boulder Canyon Project Act (45 Stat. 1057) is unconstitutional and void and to enjoin each of the defendants from carrying out any provision of the Compact or Act or any contract based upon such Compact or Act. (Bill, 39.)

The Compact and the Act are set forth as appendices to the bill of complaint. (Pp. 50, 58.) As said in the proclamation of the President on June 25, 1929 (see Bill, 22), the Compact has been approved by the States of California, Colorado, Nevada, New

Mexico, Utah, and Wyoming; and by the Act it was approved by Congress. Sec. 13 (a), Bill, 74.)

The Compact apportions the greater part, but not all, of the water of the Colorado River and its tributaries. The Colorado River territory is divided into an Upper Basin and a Lower Basin at Lee Ferry, a point in the Colorado River near the Northern boundary of the State of Arizona. Article II of the Compact provides (Bill, 52):

> (f) The term "Upper Basin" means those parts of the States of Arizona, Colorado, New Mexico, Utah, and Wyoming within and from which waters naturally drain into the Colorado River System above Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the system above Lee Ferry.
>
> (g) The term "Lower Basin" means those parts of the States of Arizona, California, Nevada, New Mexico, and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the system below Lee Ferry.

Art. III of the Compact provides (Bill, 52-54):

Article III.

> (a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use

of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

(b) In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre-feet per annum.

(c) If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River System, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).

(d) The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.

(e) The States of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water which can not reasonably be applied to domestic and agricultural uses.

(f) Further equitable apportionment of the beneficial uses of the waters of the Colorado River System unapportioned by paragraphs (a), (b), and (c) may be made in the manner provided in paragraph (g) at any time after

October first, 1963, if and when either Basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b).

(g) In the event of a desire for a further apportionment, as provided in paragraph (f), any two signatory States, acting through their Governors, may give joint notice of such desire to the Governors of the other signatory States and to the President of the United States of America, and it shall be the duty of the Governors of the signatory States and of the President of the United States of America forthwith to appoint representatives, whose duty it shall be to divide and apportion equitably between the Upper Basin and Lower Basin the beneficial use of the unapportioned water of the Colorado River System, as mentioned in paragraph (f), subject to the legislative ratification of the signatory States and the Congress of the United States of America.

Section 13 (a) of the Boulder Canyon Project Act approves (Bill, 74) the Colorado River Compact and it is now effective.

By the Boulder Canyon Project Act the Secretary of the Interior is authorized to construct a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon to create a storage reservoir subject to the terms of the Colorado River Compact.

The Colorado River Compact assures to the Lower Basin a minimum average flow of 7,500,000 acre-feet in the main stream of the Colorado River at Lee Ferry. According to the bill (p. 8) 1,000,000 acre-feet enter the river between Lee Ferry and Laguna Dam, and this does not include water from the Gila River, which enters the Colorado River ten miles below Laguna Dam. (Bill, 7.)

Arizona is not forbidden to make additional appropriations of water at the present time, or at any future time.

The complainant alleges that there are numerous sites which are suitable for the construction, maintenance, and operation of dams and reservoirs the development of which would long since have commenced, but for the passage of the Boulder Canyon Project Act (Bill, 12); but the only site which it names is at Black Canyon, on the boundary line between Arizona and Nevada (Bill, 10); and the State does not show that it would be possible for any one other than the United States to secure title to the land which would be used in the construction of a dam and reservoir at that site, nor that it would be possible for any permittee of the State of Arizona to construct a dam at that point, or at any other point on the river where it constitutes a boundary between two States, without the consent of a State which is a party to the Colorado River Compact, and which presumably would not grant such consent except in furtherance of the purposes of the Compact.

The first section of the Act (Bill, 58) declares that the law is enacted

> for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financial solvent undertaking. * * *

Section 9 (Bill, 71) ordains:

> That all lands of the United States found by the Secretary of the Interior to be practicable of irrigation and reclamation by the irrigation works authorized herein shall be withdrawn from public entry.

The section then provides for the disposition of such lands in accordance with the provisions of the reclamation law. The complainant contends (Bill, 32) that the dam and reservoir which the Act purports to authorize the Secretary of the Interior to construct is larger than is necessary for the reclamation of public lands. The complainant does not, however, deny that the United States proposes to use water from the reservoir for the reclamation of public lands.

Arizona also contends that over the waters of this boundary stream, even where it has political jurisdiction only to the middle of the stream (Constitution of Arizona, Article I), it can maintain against other States and against the United States the same control which it might maintain against its own citizens. These defendants submit that as against other sovereignties the only right of the complainant is to a fair apportionment of the water; that that apportionment is best made by negotiation between the sovereignties; that the carrying out of the immediate plans of the Compact States and of the United States will not deprive the State of Arizona of a fair share of the water.

The State of Arizona is not a party to the Compact or bound by its terms, nor is it deprived of any right to appropriate water of the Colorado River which

it would possess if the Colorado River Compact were not in existence.

These defendants assert that by the construction of the Boulder Canyon reservoir waters will be conserved that otherwise would be lost to all the states of both Basins, and a larger quantity of water will be made available for beneficial use in the Lower Basin, and a larger quantity retained for use in the Upper Basin than if the reservoir were not built.

SUMMARY OF ARGUMENT.

These defendants state that the Bill fails to present for adjudication any case or controversy of which the Court can take judicial cognizance, for the reason that the rights, against the alleged invasion of which the injunction is prayed for, are purely political rights, and such an issue is one in respect of which this Court has always said it cannot take judical cognizance.

Allegations in respect of non-navigability of the Colorado River and the reclamation of public lands contained in the Bill of Complaint do not state any issuable fact, because such allegations are only argumentative statements made for the purpose of laying the foundation for questioning the motives and purposes of Congress in enacting the Boulder Canyon Project Act, and it is not the province of the judicial branch of the Government to question the motives of the Congress.

The complaint does not state facts sufficient to constitute a cause of action for the reason that the complainant is not a party to the Colorado River Compact, and is not in a position to question its validity or constitutionality, since it cannot affect the sover-

eignty of the State of Arizona. Arizona cannot therefore invoke the jurisdiction of this Court for the purpose of construing the Compact or the Act of Congress approving the same and making it effective upon the property of the United States.

The Colorado River Compact is valid and constitutional since the States have power to enter into Compacts with other States or the United States with the consent of the Congress, which was obtained. The Compact involves subject-matter within the jurisdiction of contracting States, and is binding upon states and the United States.

The Boulder Canyon Project Act is constitutional.

The bill is without equity, for the reason that complainant nowhere offers to do equity, offering to equitably apportion the waters of the river system with her sister States.

ARGUMENT.

Bill of Complaint Does Not Present for Adjudication Any Case or Controversy of Which the Court Can Take Judicial Cognizance, or State a Cause of Action for Relief in Equity.

The complainant has joined the Secretary of the Interior with the six signatory states to the Colorado River Compact as parties defendant to an original bill filed in this Court and prays "that the Colorado River Compact and the Boulder Canyon Project Act, and each and every part thereof, be decreed to be unconstitutional, void and of no effect and that the defendants and each of them be enjoined and restrained from enforcing or carrying out said compact or said act or any of the provisions thereof."

These defendants assert that the Bill fails in two respects: First, to present for adjudication any case or controversy of which the Court can take judicial cognizance, and, second, to state any cause of action for equitable relief.

The gravamen of the Bill is that the Boulder Canyon Project Act is unconstitutional and void in that it:

"Is in *excess* of the *powers granted* to Congress by the Constitution of the United States" (Bill, p. 29), and that, its effect, if carried into execution by the Secretary of the Interior, will result in an invasion of Arizona's sovereign jurisdiction and right to control the water and other natural resources of said State; of its rights and those of its citizens, inhabitants and other property owners to appropriate and use said water and other natural resources, and of its sovereign authority and right to levy and collect taxes upon businesses and property used in connection therewith which, but for the operation of the Act, *would be* developed and result in "great increase in population, wealth, prosperity and taxable resources of said State."

These allegations constitute the sum total of the allegations contained in the Bill upon which the Complainant relies for the statement of a cause of action for equitable relief against the enforcement of the Boulder Canyon Project Act, and are epitomized and specified with particularity in Paragraph XXVIII, pp. 29, 30 and 31 and Paragraph XXXVI, pp. 38 and 39, which, read in connection with the prayer for relief at pages 39 and 40 of the Bill, clearly identifies the kind of cause for relief in equity against the enforcement of the act upon which complainant has placed its whole reliance.

These rights, against the alleged invasion of which the injunction is prayed, are purely political rights, upon the existence and alleged injury to which the complainant attempts to raise a purely political issue. Such an issue is one in respect of which this Honorable Court has always said it cannot take judicial cognizance.

State of Georgia v. Stanton, 6 Wall. 50.
State of N. J. v. Sargent, 269 U. S. 328.
Mass. v. Mellon, 262 U. S. 447.
State of Texas v. I. C. C., 258 U. S. 162.
Muskrat v. U. S., 219 U. S. 346, 361.
Stearns v. Wood, 236 U. S. 75, 78.

Aside from these political rights, no private civil, personal or property right of the State of Arizona or of anyone else is set forth in, or sought to be protected from injury, by the Bill.

While the Bill alleges that the State owns lands, the irrigation and reclamation of which will be defeated by the Act, and that the Act attempts to authorize the Secretary to utilize for public purposes the water and other natural resources of the State, it is apparent upon the face of the bill that said alleged rights, if ever to be affected by the operation of the act or compact at all, could possibly be affected thereby only incidentally and consequentially, and that, as stated by this Honorable Court in State of Georgia v. Stanton, *supra*:

> "This reference to property and statement concerning it are only by way of showing one of the grievances resulting from the threatened destruction of the state and in aggravation of it, not as a specific ground of relief. This matter of prop-

erty is neither stated as an independent ground, nor it is noticed at all in the prayers for relief. Indeed, the case as made in the bill would have stopped far short of the relief sought by the state and its main purpose and design could not be by restraining its remedial effect simply to the protection of the title and possession of its property. Such relief would have called for a very different bill from the one before us."

In addition to the foregoing allegations, scattered throughout the bill there are allegations from which the inference is to be drawn that the State of Arizona attempts to sue in behalf of its citizens, inhabitants and property owners as *parens patriae*, although the only rights of such citizens, inhabitants and property owners that the complainant would so protect are of the same public nature as those alleged by the state in its own behalf, and none of which could suffer any direct injury as the result of the execution of the Boulder Canyon Project Act or of the Colorado River Compact.

None of such citizens, inhabitants or property owners are made parties to the action. On the contrary, Arizona attempts to represent them as *parens patriae*, but this it cannot do for the reason that they are citizens, inhabitants and property owners of the United States as well as of the State of Arizona, which for that reason has no authority in such a case as this to assume to represent them in such a capacity.

In *Commonwealth of Massachusetts v. Mellon*, 262 U. S. 447; 43 Sup. Ct. 597, at page 600, this Court said:

"While the state under some circumstances may sue in that capacity for the protection of its

> citizens (Mo. v. Ill. and Chicago District, 180 U. S. 208, 241), it is no part of its authority or power to enforce their rights in respect of their relations with the Federal Government. In that field the United States, and not the state, is representative *parens patriae*, when such representation becomes appropriate; to the former and not to the latter they must look for such protective measures as flow from that status."

It is therefore apparent that the question attempted to be presented, and the only question that could be presented for adjudication, in connection with such a prayer for relief against the enforcement of such an Act of Congress or compact between sovereign states by the State of Arizona acting in its sovereign, governmental and political capacity as a state is: "Has Congress the power to legislate for the purposes declared in the act, and have the states the authority with the consent of Congress to enter into such a compact?", because those questions are questions which, as between the State of Arizona, acting in such a capacity, and the Congress acting in its legislative capacity as a department of the United States Government, and the signatory states to the compact acting in their sovereign capacity as states of the Union, are purely political questions; for that reason they are questions of which courts cannot take judicial cognizance.

We therefore submit that the State of Arizona, not having attempted to state any cause of action for relief against the execution of either the Boulder Canyon Project Act or the Colorado River Compact on the ground that they, or either of them, will violate any private civil, personal or property right of

said State or of any person, corporation, citizen or inhabitant thereof, the bill wholly fails to present for adjudication any case or controversy of which the Court can take judicial cognizance or to state any cause for equitable relief whatever. In being so limited to an effort to secure political relief, the bill must be dismissed with prejudice for the reason that it furnishes nothing by which to amend and could not possibly be amended without making a new bill.

> "A complainant cannot be permitted, under the guise of an amendment, to make a new bill."
>
> *U. S. v. Whitted*, 245 Fed. 629.
> *Shields v. Barrow*, 17 Howard 130.

Allegations in Respect of the Navigability of the Colorado River and the Reclamation of Public Lands.

At pages 6, 7, 31 and 32, the Bill contains allegations concerning the navigability of the Colorado River and the Reclamation of Public Lands, which, instead of having been made for the purpose of stating a cause of action for equitable relief against the enforcement or carrying out of the Act of Congress or the six-State Compact, are, without equivocation, made for the distinct purpose of questioning the motives and purposes of Congress in enacting the Boulder Canyon Project Act.

This purpose is distinctly alleged with certainty on pages 31 and 32 of the Bill as follows:

> "The recital in said act that the purpose thereof is the improvement of navigation and the reclamation of public lands is a mere subterfuge and false pretense. That the improvement of

navigation is not the purpose of said act is evident from the fact that the Colorado River is not navigable (etc.) * * * That the reclamation of public land is not the purpose of said act is evident from the fact that 75 per cent of all land which will or can be reclaimed or benefited by the construction of the dam * * * is privately owned land, etc.)." (Bill, pp. 31, 32.)

These are the conclusions which the complainant has drawn from the allegations respecting navigability and reclamation to which reference is had, and, we respectfully submit that they state the purpose and intent of the allegations in words too plain to leave any room for misinterpretation.

That said allegations do not state any issuable fact and that they were not intended to state a cause of action or even remotely relied upon as a ground of relief, we submit, is rendered doubly apparent by the further facts appearing on the face of the Bill:

(1) Neither the non-navigability of the Colorado River nor any lack of reclaimable public lands are included within any of the alleged reasons upon which the complainant relies, and which it has specified with particularity at pages 29, 30 and 31 of the Bill, as the grounds upon which it bases the allegation that:

> "Said Boulder Canyon Project Act is in excess of the powers granted to Congress by the Constitution of the United States, and is unconstitutional and void." (Bill, p. 29.)

This and the other allegations on pages 29, 30 and 31, and pages 38 and 39 of the Bill to which we have referred above, raise a distinct, and the only, issue

raised in the Bill by which the complainant even attempts to question the constitutionality of, or upon which it in any sense relies for an injunction against the enforcement of, the Boulder Canyon Project Act.

(2) The allegations at said pages 6 and 7 of the bill to which we refer in this discussion state, in substance, that:

> "There are numerous rapids, cataracts and other natural obstructions, because of which, and because of the great fall and rapid flow of said river, navigation thereof in Arizona and on the boundary between Arizona and Nevada, has always been and is now utterly impossible." (Bill, p. 7.)

and that between Arizona and California and Arizona and Mexico the river is obstructed by sand bars, silt, Laguna Dam, the diversion of waters for irrigation and other purposes and that:

> "Because of said conditions, said river has never been, and is not now, a navigable river." (Bill, p. 8.)

Our motion to dismiss admits any facts well pleaded by the complainants and all reasonable inferences to be drawn therefrom, but it does not admit the arguments it has made nor the conclusions it has seen fit to draw from such facts as it has alleged.

> *U. S. v. Des Moines, etc. Co.*, 142 U. S. 544.
> *Demaison v. Thomas Mfg. Co.*, 94 Fed. 654.

But are the facts to which we referred above well pleaded; do they raise any issue of fact whatever? We submit that clearly they do not for the following reasons:

Any one or all of the obstructions alleged in the bill may exist in fact without rendering the river a non-navigable stream in that it may be susceptible of navigation regardless of any or all of the said natural or artificial obstructions.

Economy Light Co. v. U. S., 256 U. S. 121, 122.
St. Anthony Falls v. St. Paul, etc. Co., 168 U. S. 349.
The Montello, 20 Wall 430, 440-443; *The Daniel Ball*, 10 Wall. 557.
U. S. v. Chandler-Dunbar Co., 229 U. S. 53.

The facts that the river is not navigable in its entirety or that obstructing falls or rapids may be of such a nature as to defeat navigation in places does not render such a stream a non-navigable stream if it can be used for purposes of commerce above or below such falls or rapids. Neither is the existence of silt, soft mud or sand bars the true criterion by which the navigability or non-navigability of a stream is to be determined.

41 C. J. 413, 414.
St. Anthony Falls Co. v. Minneapolis Co., 168 U. S. 349.
Economy L. & P. Co. v. United States, 256 Fed. 792, aff'd, 256 U. S. 113.
Hubbard et al. v. Fort et al., 188 Fed. 987.
Western Union Co. v. Inman, 43 Fed. 85.
The Stearns Dredge, 222 Fed. 576.

Therefore, the allegations of this bill amount to nothing more than that the Colorado River is not a navigable stream. Even stronger allegations respecting the navigability of a stream were made in *Walker v. Allen*, 72 Ala. 456, wherein the Alabama Court said:

> "The bill contained no more than an averment that the stream is a navigable river. * * * The bill avers consequently a legal conclusion omitting an averment of the facts from which it can be drawn by the court. Such an averment is insufficient and renders the bill obnoxious to the first of the causes of demurrer."

In respect of the reclamation of public lands the allegations of the bill consist only of a statement of fact to the effect:

> "That the reclamation of public lands is not the purpose of said act is evident from the fact that 75 per cent of all land which will or can be reclaimed or benefited by the construction of the dam, etc., is privately owned land (etc.)."

Instead of raising any issue in respect of reclamation, this allegation constitutes an admission that there are public lands to be reclaimed and benefited by the construction of the dam or reservoir. Consequently, we submit that it is apparent upon the face of the bill that no issuable fact, either in respect of the navigability of the Colorado River or the reclamation of public lands, is raised by the bill and that in respect of both navigability and the reclamation of public lands the allegations of the bill consist only in argumentative statements made for the purpose of laying a foundation for the conclusions that:

> "(a) Because of said conditions, said river has never been and is not now a navigable river." (Bill, p. 7.)

and that: (b) "the recital in said act that the purpose thereof is the improvement of navigation and the

reclamation of public land is a mere subterfuge and false pretense." (Bill, p. 31.) We are therefore brought to the conclusion that in so far as these allegations are concerned, the bill does not even contemplate the statement of a cause of action or of an issue of fact relied upon by the complainant as a ground for relief in equity, but that these allegations in respect of the navigability of the stream and the reclamation of public lands were made for the sole purpose and with the specific intent of laying a foundation for questioning the motives and purposes of Congress in enacting the Boulder Canyon Project Act. But, as this Honorable Court said in *Smith v. Kansas City Title Co.*, 255 U. S. 210:

> "Nothing is better settled by the decisions of this court than when Congress acts within the limits of its constitutional authority, it is not the province of the judicial branch of the government to question its motives."

(3) Even had said allegations in respect of the navigability of the Colorado River been so pleaded that they might have, in fact, raised an issue of fact in respect of the navigability of the stream, the actual facts of which this Honorable Court can take judicial notice are that said stream is a navigable stream in fact and in law, as is abundantly exemplified in the brief of the Solicitor General. In such circumstances, had the complainant raised an issue of fact in respect of the navigability of the river, any such allegations would have to be disregarded for the reason that they would not be in accord with the actual facts of which the court could take judicial notice.

Jones v. United States, 137 U. S. 202.

(4) Section I of the Boulder Canyon Project Act declares the purposes of Congress in its enactment to be "improving navigation, * * * reclamation of public lands (etc.)." This declaration of purpose having been made by Congress itself in enacting the statute, the court is bound by the conclusive presumption that any facts essential to the validity of the act did, in fact, exist at the time of its enactment and that if any special finding of those facts was required to warrant the passage of the act, for the purposes of this case, the fact that Congress enacted the statute and in so doing declared its purpose to be the improvement of navigation, is the equivalent of such a finding.

U. S. v. Des Moines, 142 U. S. 544, 545.
Atchison, Topeka & Santa Fe R. Co. v. Matthews, 174 U. S. 104.
6 R. C. L 112, 113, 114.

The Complaint is so Fatally Defective as to Require Dismissal With Prejudice.

The cause of action actually attempted to be alleged in the bill, being one questioning the constitutionality of an Act of Congress by claiming rights which are merely political, and of which the court cannot take judicial cognizance, is fatally defective and cannot be amended to state a cause of action for the protection of private civil, personal or property rights for the reason that such a cause of action would make a new bill.

We submit that this conclusion is inevitable because of the fact that, having attempted to state a cause of action questioning the constitutionality of the act upon the distinct theory that "Said act is in excess

of the powers granted to Congress by the Constitution" and that its effect, if enforced, would be to invade its political rights, the complainant thereby attempted to present to this Honorable Court for adjudication a political issue of which it can not take judicial cognizance, without even attempting to question the constitutionality of the act upon the ground that, notwithstanding the unquestioned power of Congress to improve navigation, it *abused* that power by assuming to enact the Boulder Canyon Project Act for the declared purpose of improving the navigability of the Colorado River when, in fact, it "is not now and has never been a navigable river." Such a cause of action would be one to question the constitutionality of the act upon a ground which would involve a question of *fact* of which the court can not take judicial notice and that question of fact one which would be entirely in conflict with the declared purpose of Congress in enacting the statute by which, as shown hereinbefore, the court is conclusively bound to take judicial notice as a matter of law. Therefore, we are again brought to the conclusion that the bill cannot, by way of amendment, be made to state such a new cause of action.

The Boulder Canyon Project Act is Constitutional.

The defendant States assert the constitutionality of the Act but, except for the provisions relating to the Compact, do not argue the question because it is presented in the brief of the Government. Sections 8 (a), 13 (b), (c) and (d) of the Act (Bill 70, 75), impressing upon the management of the Boulder Canyon Project and its water users the interbasinal division of water made by the Compact and regulating the

use of the public lands of the two Basins, are valid as an exercise of the Constitutional power of the Congress to regulate the use and to dispose of the property of the United States. *Constitution*, Art. IV, Sec. 3; *Irvine v. Marshall*, 20 How. 558, 561-562; *Gibson v. Choteau*, 13 Wall. 92, 99; *Camfield v. United States*, 167 U. S. 518-524, 525-6; *Stearns v. Minnesota*, 179 U. S. 223, 250; *Butte City Water Co. v. Baker*, 196 U. S. 119, 126; *Kansas v. Colorado*, 206 U. S. 46, 92; *Light v. United States*, 220 U. S. 523, 536-7; *United States v. Midwest Oil Co.*, 236 U. S. 459, 475; *Utah Power & Light Co. v. United States*, 243 U. S. 389, 403-5; *Oregon & California Railroad Co. v. United States*, 243 U. S. 549, 553; *McKelvey v. United States*, 260 U. S. 353, 358-9; *United States v. Alford*, 274 U. S. 264, 267; *Sinclair v. United States*, 279 U. S. 263, 297; *United States v. Hanson*, (C. C. A.) 167 Fed. 881, 883-4.

Arizona is Not a Party to the Colorado River Compact and is Not in a Position to Question its Validity or Constitutionality.

The Colorado River Compact forms the basis for the future comprehensive development of the resources of the Colorado River System. The Boulder Canyon Project is but one unit of that ultimate development. The Compact was formulated by Commissioners for the seven Colorado River States, including Arizona, and by a representative of the United States, pursuant to previous consent of Congress. 42 Stat. at Large, 171. The inducing causes are stated in the Appendix. It was ratified by all the signatories, except Arizona, in 1923.

Arizona having taken no action and flood conditions requiring prompt relief, thereafter the six approving States, by special Acts of their Legislatures, agreed to make the Compact effective with respect to the six approving States and Congress, by Section 13 of the Boulder Canyon Project Act (Bill 74), approved the Compact, concurred in the special agreement and made the Compact effective upon property of the United States within the Colorado River Basin.

This action by the United States and the six approving States, did not and could not affect the sovereignty of the State of Arizona (*Stearns v. Minnesota*, 179, U. S. 223, 244-245) nor make that State a party to the Compact, and was without prejudice to the rights of that State hereafter to become a party by approval of the Compact, to remain without the Compact or to take other action as the State might be advised.

The State of Arizona is not a party to the Compact nor to the special agreement making the Compact effective upon a six state basis. The State is not in a position to question the validity of the Compact, to assert that the Compact is unconstitutional, or to invoke the jurisdiction of this Court for the purpose of construing the Compact.

The Colorado River Compact is Valid and Constitutional.

The State of Arizona asserts that the Colorado River Compact is void and unconstitutional. Assuming, but not conceding, that the State is in a position to raise that question, the charge is without merit. The Compact is necessary to prevent litigation, strife

and turmoil throughout the entire Colorado River Basin and for protection of the future development and general welfare of the six approving States. It assures harmonious cooperation between federal and state governments. It is a valid agreement among six States of the Union, approved by the Congress and concluded by the approving States in the exercise of their inherent sovereignty, in conformity with the Constitution. The inducing causes and the facts surrounding its negotiation and conclusion are stated in the Appendix.

The Compact is not to be questioned upon the ground that the signatories are States admitted since the adoption of the Constitution. Equality of the States of the Union, original and new, is indisputable. The States last to be admitted possess all the powers, dominion and sovereignty belonging to each of the original thirteen. *Scott vs. Lattig*, 227 U. S. 229, 242; *Kansas vs. Colorado*, 206 U. S. 46, 97; *Coyle vs. Smith*, 221 U. S. 553.

The States have power to enter into compacts or agreements with other States or with the United States. *Poole vs. Fleeger*, 11 Pet. 185, 209-210; Ib. (Baldwin, J.) Appendix to 11 Pet. pp. 170 a, 174-176; *Rhode Island vs. Massachusetts*, 12 Pet., 657, 725-731; *Stearns vs. Minnesota*, 179 U. S. 223, 245; *Virginia vs. Tennessee*, 148 U. S. 503; *Holmes vs. Jennison*, 14 Pet. 540, 570; *Washington vs. Oregon*, 214 U. S. 205, 218; *United States vs. Texas*, 143 U. S. 621, 646; 162 U. S. 1.

"A State may make a compact with all the States, constituting as one body the nation," respecting the public lands and other property of the United States, at the time of admission of the State. *Stearns vs.*

Minnesota, 179 U. S. 223, 244-245. Such was the compact between Arizona and the United States, in the Act of admission (Enabling Act; Act of June 20, 1910, c. 310, Sec. 28; 36 Stat. 557, 575), under which the United States subsequently reserved the Colorado River Canyon in Arizona for power purposes.

Art. I, Sec. 10, par. 3, of the Constitution provides:

> "No State shall without consent of Congress * * * enter into any agreement or compact with another State."

Such consent having been obtained, the States are, "in this respect restored to their original inherent sovereignty; such consent being the sole limitation imposed by the Constitution, when given, left the States as they were before * * * whereby their compacts became of binding force * * * operating with the same effect as a treaty between sovereign powers" and "become conclusive upon all the subjects and citizens thereof, and bind their rights." *Rhode Island vs. Massachusetts,* 12 Pet. 657, 725. See *Poole vs. Fleeger,* 11 Pet. 185, 209-210.

Consent of Congress may be obtained either before or after conclusion of the Compact and may be express or implied. *Wharton vs. Wise,* 153 U. S. 155, 168, 159; *Virginia vs. Tennessee,* 148 U. S. 503, 521, 525; *Virginia vs. West Virginia,* 11 Wall. 39; *Penn. vs. Wheeling etc. Co.,* 13 How. 518; *Rhode Island vs. Massachusetts,* 12 Pet. 657, 725; *Poole vs. Fleeger,* 11 Pet. 185, 209-210; Ib. (Baldwin, J.) Appendix to 11 Pet. pp. 170 a. 174-176; *Green v. Biddle,* 8 Wheat 1, 86.

No form of compact is required. As in the present

case, a compact may be in form of a writing subscribed by the agreeing States, or in form of concurrent legislation or by any other method. The Colorado River Compact, consisting of an approved written document and concurring Acts of the Legislatures of the six approving States and of The Congress, constitutes a valid compact even though the language used in the several Acts may vary. *Olin v. Perry Kitzmiller*, 259 U. S. 260; *Wharton v. Wise*, 153 U. S. 155, 168; *Virginia v. Tennessee*, 148 U. S. 503, 517; *Washington v. Oregon*, 214 U. S. 205, 218; *Rhode Island v. Massachusetts*, 12 Pet. 657, 725-731; *Holmes v. Jennison*, 14 Pet. 540, 570.

The Compact involves subject matter within the jurisdiction of the contracting States, and a valid and constitutional exercise of their sovereignty. *Wyoming v. Colorado*, 259 U. S. 419; *Hudson Water Co. v. McCarter*, 209 U. S. 349, 354-357; 70 N. J. Eq. 695, 717; *Kansas v. Colorado*, 185 U. S. 125; 206 U. S. 46; *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237-238; *Richey etc. Co. v. Miller & Lux*, 218 U. S. 258; *Missouri v. Illinois*, 180 U. S. 208; 200 U. S. 496; *Gutierres v. Albuquerque L. & L. Co.*, 188 U. S. 545, 552, 553; *Shively v. Bowlby*, 152 U. S. 1.

The Act of Congress (42 Stat. at Large 171) consents that the Colorado River States may "negotiate and enter into a compact or agreement * * * providing for an equitable division and apportionment among said States of the water supply of the Colorado River and of the streams tributary thereto."

The Colorado River Compact was concluded November 24, 1922, pursuant to said Act. Sec. 13, of the Boulder Canyon Project Act (Bill, p. 74) uncondi-

tionally approves the Compact, to be effective upon either a six state or a seven state basis. The State of Arizona may accept or reject the Compact, at its election, but the Compact is now effective among the six approving States and the United States. Appropriations of funds by Congress since approval of the Compact have "signified the consent of that body to its validity". *Green v. Biddle,* 8 Wheat. 1, 26.

The Compact binds the United States, its rights "in or to the waters of the Colorado River and its tributaries", and its property within the Colorado River drainage. See Sec. 13, par. b, c, and d, Boulder Canyon Project Act (Bill, 75). It binds and is conclusive upon the six approving States, their citizens and inhabitants and their rights and property within the Colorado River Basin. *Rhode Island v. Massachusetts,* 12 Pet., 657, 725; *Kansas v. Colorado,* 206 U. S. 46, 98; *Georgia v. Tennessee Copper Co.,* 206 U. S. 230, 237-238; *Richey & Co., v. Miller & Lux,* 218 U. S. 258, 261; *Virginia v. Tennessee,* 148 U. S. 503, 525.

Rights vesting under the Compact are protected from impairment by the Constitution. *Olin v. Perry Kitzmiller,* 259 U. S. 260; *Green v. Biddle,* 8 Wheat. 1; *Hawkins v. Barney,* 5 Pet. 457; *Stearns v. Minnesota,* 179 U. S. 223; *Pennsylvania v. Wheeling etc. Bridge Co.,* 13 How. 518; *Tucker v. Ferguson,* 22 Wall. 143, 155.

The Compact is conclusive with respect to the subject matter. Its construction is a judicial question. *Poole v. Fleeger,* 11 Pet. 185, 209-210; Ib. (Baldwin, J.), Appendix to 11 Pet. pp. 170 a., 175-176; *Rhode Island v. Mass.,* 12 Pet. 657, 725; *Sim v. Irvine,* 3 Dall, 425, 454; *Marlatt v. Silk,* 11 Pet. 1, 2, 18; *Burton*

v. Williams, 3 Wheat. 529, 533. As stated in *Marlatt v. Silk, supra*:

> "The question arises under, and is to be decided by a compact between two States where, therefore, the rule of decision is not to be collected from the decisions of either State, but is one, if we may so speak, of an international character."

The Compact was negotiated and concluded with consent of the Congress and the Congress thereafter approved it. It is effective among competent signatories and treats of subject matter within their jurisdiction. It is valid and constitutional.

The Colorado River Compact Works no Injury to the State of Arizona.

The State of Arizona has not approved the Compact and is not bound by its provisions. The enforcement of the Compact among the approving States will not injure the State of Arizona.

The allegations of injury by the Compact are set forth in Paragraph XIV of the Bill of Complaint (pp. 16-19). The first two refer to alleged needs of that State, without regard to the actual needs of the other States where the river has its origin, and to alleged errors in the partial allocation of water to the two Basins by the Compact. The statements respecting partial allocations are incomplete and inaccurate and do not reveal how, if at all, the provisions referred to could work injury to that State.

The next allegation complains of inclusion of the Gila River and its tributaries as a part of the Colorado River System. The Gila is one of the most im-

portant of the many tributaries of the Colorado River. It contributes its supply to the common water fund at Yuma, several miles above the diversion works of the enormous Imperial Valley Canal which serves the lands in both the United States and Mexico. Its sources are in the State of New Mexico, and there is nothing to distinguish the Gila from the Green, the Grand, the San Juan, or any other tributary. Allegations that its waters, to quite an extent, are used within the State of Arizona and that it is desirable that the waters be there first used, in no manner change its tributary character or reveal wherein the Compact injures the State. The Compact is inoperative as regards that State, and it will so remain until approved by the state Legislature.

Lastly, it is complained that the Compact permits the party States to use some part of the allocated waters upon territory outside the drainage basin of the Colorado River System. Such diversions and uses are universally permitted throughout the Western States, where irrigation is practiced. *Wyoming v. Colorado*, 259 U. S. 419, 466.

The Bill is Without Equity for the Reason that Therein the Complainant Nowhere Offers to do Equity.

In total disregard of the definitely stated principles of interstate common law heretofore enumerated by this Honorable Court in *Kansas v. Colorado*, *Wyoming v. Colorado*, and in other cases, the State of Arizona asserts the need, the sovereign power and right and the definite intention to appropriate and use all of the waters of the Colorado River flowing through said State for the benefit of itself, its citizens, inhabitants and other property owners to the

exclusion of the necessities and rights of her sister states through which the river flows. She offers no hope of any equitable apportionment of said waters as between herself and her sister states in the event her prayer for relief should be granted; and for this reason we respectfully submit that this is a suit for equitable relief and therefore one in which the maxim "He who seeks equity must do equity" calls for specific application.

CONCLUSION.

Wherefore for the reasons hereinbefore set forth these defendants respectfully submit that the Bill of Complaint be dismissed.

Respectfully submitted,

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APPENDIX.

The Colorado River Compact History and Inducing Causes.

The Colorado River and the flood conditions which necessitate its control, are discussed in Appendices A and B of the Solicitor General. From these and references herein, it appears:

The entire river system drains an arid region where otherwise fertile valleys and mesas require the artificial application of waters to sustain life and agriculture. Use of the waters is necessary to the life, health, prosperity and general welfare of the people of the States where such waters originate and to the development of the region, the growth of cities and institutions and to the support of government.

The drainage basin naturally is divided into two regions or basins, termed the "Upper Basin" and the "Lower Basin." The point of convenient demarkation between the two basins is Lee Ferry in northern Arizona, located at the head of the Grand Canyon and below those streams contributing to the river within the upper region. These two regions differ in soil, climate and other characteristics. The Upper Basin is traversed by many valleys of varying magnitude and is characterized by progressive development conforming to the overcoming of natural obstacles and to improvement in transportation. In the Lower Basin streams of erratic flow traverse desert areas but the lands are more accessible and natural conditions favor a more rapid development.

The results of investigations by the Reclamation Service, subsequent to the break of the river into the Salton Sea in 1905, were brought to the attention

of the people of the seven Colorado River States. It was evident that complete control of the flow of the waters of the river by reservoirs, was essential to satisfactory solution of Lower Colorado River problems. The investigations revealed that substantially all the flow of the Colorado River above the mouth of the Gila, could be controlled by an immense reservoir at or near Boulder Canyon, to be later supplemented by other reservoirs upon the main stream and tributaries above that point. But to render feasible the construction of a gigantic control reservoir at Boulder Canyon, it would be necessary to beneficially use all the waters there impounded, for power, irrigation, municipal and other purposes. Such beneficial use of all the waters of the river might give rise to monopolistic adverse claims as against the entire Upper Basin and might interfere with and there prevent future expansion of development.

The Compact was concluded to solve this, and other problems respecting future development of the river system.

The history of the origin of the Compact and the inducing causes are stated in:—Report of Hearings Senate Comm. Irr. and Recl., 69 Cong. 1st Sess., Re Colorado River Basin, pp. 312-313, 663-679; and in Report of Colorado River Commissioner for Colorado, Cong. Rec., Dec. 14, 1928, 70 Cong., pp. 601-610.

From these sources it appears:

In necessary self defense, the States of the Upper Basin opposed any and all further major developments, by reservoirs or otherwise, along the river in the Lower Basin, until protection was afforded future development within the Upper Basin. There were assurances that the water supply of the river is

ample to supply all present and future needs, if controlled by storage, and that no injury need result from construction of Boulder Canyon Reservoir and from uses of waters thereby. But former assertions of adverse claims resulting from uses of water by means of reservoirs upon interstate streams caused a demand for adequate protection to the States of origin from adverse claims on behalf of the beneficiary States of the lower river. Rep. of Hearings, *supra*, pp. 664-665, 695-700; 312.

A series of conferences followed between representatives of the interested States and federal officials. Cong. Rec. Dec. 14, 1928, 70 Cong., pp. 601-610. The first was at Salt Lake City, January 18-21, 1919. The Governor of Utah presided and resolutions were adopted favoring first development at the head waters of the Colorado River System, stating:

> "The history of irrigation throughout the world has shown that the greatest duty of water is had by first using it upon the upper reaches of the stream and continuing the use progressively downward. In other words, 'The water should first be captured and used, while it is young,' for it can then be recaptured as it returns from the performance of its duties and thus be used over and over again."

Similar conferences subsequently were held at Los Angeles where similar resolutions were adopted.

August 25-27, 1920, representatives of the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming and federal officials met at Denver. The Governors of several of the States participated and the Governor of Arizona presided. The resolutions adopted reaffirmed the principles an-

nounced in the resolutions adopted at the Salt Lake and Los Angeles conferences. But, after reciting that, from information presented by the Director of the Bureau of Reclamation of The United States "the water supply of the Colorado River drainage is sufficient to supply the present necessities of all the States whose territory is involved and that all present and future interference with development upon or from the upper reaches of the stream should be avoided," the following resolution was adopted:

> "Resolved, That it is the sense of this conference that the present and future rights of the several States, whose territory is in whole or in part included within the drainage area of the Colorado River, and the rights of the United States, to the use and benefit of the waters of said stream and its tributaries, should be settled and determined by compact or agreement between said States and the United States, with consent of Congress, and that the legislatures of said States be requested to authorize the appointment of a commissioner for each of said States for the purpose of entering into such compact or agreement for subsequent ratification and approval by the legislature of each of said States and the Congress of the United States." (Rep. of Comm. *supra*, Cong. Rec. 601-605.)

At the 1921 sessions of their Legislatures, the seven Colorado River States authorized the appointment of commissioners for the purpose of negotiating a compact respecting the waters of the Colorado River and its tributaries. Commissioners having been named for each of the States, the Governors and Commissioners met at Denver, May 10, 1921, and adopted resolutions requesting Congress to authorize and

The President to appoint a representative for the United States to participate in the negotiations, and directing that the resolutions be laid before The President and The Congress by the Governors of the seven States. The resolutions were presented to The President May 19, 1921.

The resolutions are set forth in full in the Report of the Colorado River Commissioner for Colorado (Cong. Rec., December 14, 1928, 70 Cong., pp. 601-608). The statement accompanying the resolutions reads, in part:

> "The object of the pending legislation is to permit a settlement respecting the future utilization and disposition of the waters of the Colorado River, and of the streams tributary thereto, by compact between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming.
>
> "The object is to determine the respective rights of the States to the use and disposition of the waters of this great river prior to any further large construction or extensive utilization of these waters, in order that the rights of the States and the Government may be settled and determined in advance of construction and before interstate or other controversies may arise."

Congress promptly consented to the proposed compact to provide for "an equitable division and apportionment among said States of the water supply of the Colorado River and of the streams tributary thereto, upon condition that a suitable person, who shall be appointed by The President of the United States, shall participate in said negotiations, as the representative of and for the protection of the inter-

ests of the United States" and thereafter make report to Congress.

The Act of Congress was approved August 19, 1921, and The President later named Herbert Hoover as the representative of the United States upon the Commission.

The Colorado River Compact was concluded at Santa Fe, New Mexico, November 24, 1922, after protracted negotiations and a number of public hearings in the region involved. The seven Colorado River States (including Arizona) were signatories.

The Compact was submitted to the Legislatures of the seven States at the 1923 sessions and was approved and ratified by all except the Legislature of Arizona. Report, Hearings Senate Comm. Irr. & Red. *supra*, pp. 312-313.

Failure of Arizona to ratify the Compact delayed proceedings for the ultimate construction of works for flood protection to lands, property and cities in both Arizona and California. The imminence of the flood peril prompted the introduction of bills before Congress to authorize the construction of Boulder Canyon Dam without awaiting approval of the Compact by Arizona and caused great pressure to be brought to bear upon the Upper Colorado River States and upon their Senators and Representatives in Congress, to authorize the construction of the reservoir without the protection which the Compact would afford.

The reservation of the Colorado River Canyon in Arizona, for power purposes, by the United States, pursuant to the compact between the United States and the State of Arizona in the Act admitting the State to the Union (Enabling Act; Act of June 20, 1910, C. 310, Sec. 28; 36 Stat. 557, 575) gave the

United States control of the canyon in Arizona. This reservation, if subjected to the Colorado River Compact, would become a source of protection to the Upper States as regards future claims from users of waters below Lee Ferry. This was a factor in the proceedings subsequent to 1923. Rep. of Hearings, Senate Comm. Irr. & Recl. *supra*, pp. 639, 601, 708.

Article XI of the Compact requires approval by the Legislatures of the seven signatory States. A special agreement among the six approving States was necessary to make the Compact effective among those States, without prejudice to the right of the State of Arizona to proceed as that State might elect. Such a special agreement was made among California, Colorado, Nevada, New Mexico, Utah and Wyoming, by concurrent legislation at the 1925 and subsequent sessions of their Legislatures. Rep. of Hearings, Senate Comm. Irr. & Recl. *supra*, pp. 312-313, 679-680, 683-687 and Congress enacted similar legislation by Sec. 13, Boulder Canyon Project Act. Bill, p. 74. The Act of Congress also impressed the Compact upon the reservations and property of the United States in the Colorado River Basin, including the Colorado River Canyon in Arizona. Bill Sec. 13b, 13c, 13d, p. 75.

The Compact is effective among the six approving States and the United States has approved it and made it effective upon either a six state or a seven state basis.

The Compact.

(Bill, p. 50)

The major purposes of the Colorado River Compact are thus stated in Article I:

"The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River System; to establish the relative importance of different beneficial uses of water; to promote interstate comity; to remove causes of present and future controversies, and to secure the expeditious agricultural and industrial development of the Colorado River Basin, the storage of its waters and the protection of life and property from floods. To these ends the Colorado Basin is divided into two Basins, and an apportionment of the use of part of the water of the Colorado River System is made to each of them with the provision that further equitable apportionment may be made."

Article II defines the Colorado River System to mean "that portion of the Colorado River and its tributaries within the United States of America."

The Colorado River Basin is divided into an "Upper Basin" and a "Lower Basin." The Upper Basin to include those parts of Arizona, Colorado, New Mexico, Utah and Wyoming "within and from which waters naturally drain into the Colorado River System above Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System above Lee Ferry." The Lower Basin to include all similar portions of the territory of Arizona, California, Nevada, New Mexico, and Utah below Lee Ferry. The Gila River drainage is a principal part of the Lower Basin.

"Beneficial consumptive use" is made the basis of apportionment. A considerable part of the waters diverted and used within the drainage basin of the

river system returns for further use and reuse, while waters diverted and used upon territory outside the drainage basin are wholly "consumed" as regards further benefits to the river system. Cong. Rec., Dec. 14, 1928, pp. 608-610. The latter class includes such diversions as those made for use in the Imperial Valley region, which drains into the Salton Sea, or those made by tunnels, aqueducts and canals through or over the divides such as the tunnel diversions in Colorado and Utah or the proposed aqueduct to Southern California cities. Apportionment of the waters of the Colorado River System was made by the Compact upon the basis of waters to be consumed by each Basin.

Article III allocates and apportions in perpetuity to the Upper Basin the "exclusive beneficial consumptive use of 7,500,000 acre feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist." The same apportionment is made to the Lower Basin and, in addition thereto "the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by 1,000,000 acre feet per annum." In other words, the total apportionment to the Lower Basin is 8,500,000 acre feet per annum.

Respecting the international burden, the Compact provides that "if, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River System, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities" apportioned to the Upper Basin and the Lower Basin and "if such surplus shall prove

insufficient for this purpose, then the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized" in addition to the flow at Lee Ferry guaranteed to the Lower Basin by the next provision of the compact.

The balance of water supply between the two basins is preserved by a guaranty by the Upper Basin States that they will not cause the flow of the river at Lee Ferry, to be depleted below an aggregate of 75,000,000 acre feet for any period of ten consecutive years reckoned in continuing progressive series. This guaranty has no direct relation to the aggregate allocation of 8,500,000 acre feet per annum to the Lower Basin which is to be supplied out of that part of the whole Colorado River System within the Lower Basin.

Calls for and deliveries of water are to be confined to needs for agricultural and domestic purposes.

Further equitable apportionment of the remaining unallocated waters of the entire Colorado River System among the seven Colorado River States after forty years, is provided in the last two paragraphs of Article III.

Article IV makes use of waters for navigation subservient to uses for domestic and agricultural purposes, as regards interstate relations.

Provision is made for administration of the Compact and for settlement of interstate controversies by compacts and for immunity of the Indian Tribes, by Articles V, VI and VII and Article VIII protects then present perfected rights to the beneficial use of waters of the Colorado River System, which by Ar-

ticle III are to be supplied by apportioned waters, and defines relations between the two basins pending construction of a control reservoir.

Article XI provides that the Compact shall become binding and obligatory upon approval by the Legislatures of the seven signatory States and by the Congress. As already observed, this provision was modified by six States and by Congress to make the Compact effective upon all the signatory States except Arizona, by special concurrent legislation.

In brief, all waters of the Colorado River and all its tributaries in the United States are included. The right in perpetuity to consume a definite portion of the total water supply was allocated to each of the two natural divisions of the river drainage and the Lower Basin was allocated one million acre feet per annum more than was allocated to the Upper Basin where the river has its principal sources. Provision was made for any international burden and for a further allocation of any remaining waters among the seven States after forty years. Interstate uses were classified and the more important given dominance over the lesser. Provision was made for subordinate intrabasinal division of waters allocated and for settlement of interstate controversies by compacts. The requirement of seven state ratification was subsequently changed by legislative agreement to permit the Compact to become effective upon a six state basis without prejudice to Arizona.

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No. 19, Original

In the Supreme Court of the United States

OCTOBER TERM, 1930

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, STATE OF NEVADA, STATE OF UTAH, STATE OF NEW MEXICO, STATE OF COLORADO, STATE OF WYOMING, AND RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, DEFENDANTS

MOTION BY RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, TO DISMISS THE BILL OF COMPLAINT, AND BRIEF IN SUPPORT THEREOF

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 19, ORIGINAL

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, STATE OF NEVADA, STATE OF UTAH, STATE OF NEW MEXICO, STATE OF COLORADO, STATE OF WYOMING, AND RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, DEFENDANTS

MOTION BY THE DEFENDANT RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, TO DISMISS THE BILL OF COMPLAINT

Now comes the defendant Ray Lyman Wilbur, Secretary of the Interior, by the Solicitor General of the United States, and moves that the bill of complaint be dismissed for the reasons that:

1. The bill of complaint does not join the United States, which is an indispensable party to this suit.

2. The proposed acts of the defendants will not invade any vested rights of the complainant or of any of its citizens. Consequently the bill of complaint fails to state a case for equitable relief.

3. In failing to allege any actual or threatened interference with any existing right of the complainant, the bill of complaint presents only abstract questions which may never arise in any justiciable case or controversy.

4. Upon the allegations of the bill of complaint and in view of facts of which the Court will take judicial notice, the Boulder Canyon Project Act is clearly constitutional, and acts of the Secretary pursuant to its terms can not give rise to any cause of action.

Wherefore, this defendant prays that the bill of complaint be dismissed and that he be not required to plead further.

THOMAS D. THACHER,
Solicitor General.

JANUARY 12, 1931.

BRIEF FOR THE SECRETARY OF THE INTERIOR, IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT

STATE OF THE PLEADINGS

Upon leave granted, the State of Arizona filed in this Court an original bill of complaint against the six other States of the Colorado River Basin and the Secretary of the Interior of the United States. On November 24, 1930, process was made returnable on January 12, 1931. All of the defendants have moved to dismiss the complaint.

THE QUESTIONS PRESENTED

1. Is the United States an indispensable party defendant to the cause of action attempted to be alleged in the complaint?

2. Is any cause of action within the jurisdiction of this Court alleged against the Secretary of the Interior?

STATEMENT

The bill asks this Court to decree that each and every provision of the Colorado River Compact and of the Boulder Canyon Project Act (45 Stat. 1057) is unconstitutional and void and to enjoin each of the defendants from carrying out any provision of the Compact or Act or any contract based upon such Compact or Act. (Bill, 39.)

The Compact and the Act are set forth as appendices to the bill of complaint. (Pp. 50, 58.) As said in the proclamation of the President on June 25, 1929 (see Bill, 22), the Compact has been approved by the States of California, Colorado, Nevada, New Mexico, Utah, and Wyoming, and by the Act it was approved by Congress. (Sec. 13 (a), Bill, 74.)

The Compact undertakes to apportion the water of the Colorado River and its tributaries. The Colorado River territory is divided into an Upper Basin and a Lower Basin at Lee Ferry, a point in the Colorado River in the northeastern corner of the State of Arizona. Article II of the Compact provides (Bill, 52):

> (f) The term "Upper Basin" means those parts of the States of Arizona, Colorado, New Mexico, Utah, and Wyoming within and from which waters naturally drain into the Colorado River System above Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the system above Lee Ferry.
>
> (g) The term "Lower Basin" means those parts of the States of Arizona, California, Nevada, New Mexico, and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the

Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the system below Lee Ferry.

Article III of the Compact provides (Bill, 52, 53):

> (a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.
>
> (b) In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre-feet per annum.
>
> * * * * *
>
> (d) The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years, reckoned in continuing progressive series, beginning with the first day of October next succeeding the ratification of this Compact.

Section 4 (a) of the Boulder Canyon Project Act provides (Bill, 62) that the Act shall not become effective

> until the State of California, by act of its legislature, shall agree irrevocably and un-

> conditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage of this Act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this Act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the Lower Basin States by paragraph (a) of Article III of the Colorado River Compact, plus not more than one-half of any excess or surplus waters unapportioned by said Compact, such uses always to be subject to the terms of said Compact.

The same section of the Act also authorized an interstate agreement which has not been made; but the terms there set forth show how Congress has either interpreted the terms of the Compact or consented to its modification by the States of the Lower Basin. The section provides:

> The States of Arizona, California, and Nevada are authorized to enter into an agreement which shall provide (1) that of the 7,500,000 acre-feet annually apportioned to the Lower Basin by paragraph (a) of Article III of the Colorado River Compact, there shall be apportioned to the State of

Nevada 300,000 acre-feet and to the State of Arizona 2,800,000 acre-feet for exclusive beneficial consumptive use in perpetuity, and (2) that the State of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River Compact, and (3) that the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State * * *.

By the Act the Secretary of the Interior is authorized to construct a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon to create a storage reservoir and also to construct a main canal and appurtenant structures entirely within the United States connecting the Laguna Dam (or other suitable diversion dam which the Secretary of the Interior is authorized to construct if deemed necessary or advisable by him) with the Imperial and Conchella Valleys in California. (Sec. 1, Bill, 58, 59.) Other clauses relate to the meeting of international obligations by supplying water to Mexico.

The Act also provides that expenditures in connection with the dam at Black Canyon are to be recouped within fifty years and that expenditures in connection with the canal are to be recouped as provided in the reclamation law. (Sec. 4, Bill 64.)

The complainant (Bill, 7, 8) alleges that 6,500,000 acre-feet of water are diverted annually from

the Colorado River and its tributaries below Lee Ferry and are used and consumed in Arizona, California, Nevada, and New Mexico, and that of this amount 3,500,000 are used and consumed in Arizona, 2,900,000 acre-feet being diverted from the Gila River and its tributaries. Thus only 600,000 acre-feet are diverted in Arizona from the main stream. The complainant (Bill, 22) claims that the proposed compact between Arizona, California, and Nevada, which is authorized by Section 4 (a) of the Act, would not apportion to Arizona as much water as the State is using at the present time. Said proposed apportionment of 2,800,000 acre-feet of water is less than the quantity of water already appropriated in Arizona and would provide no water for future appropriation in said State.

The terms of the proposed tri-state compact have been already quoted. (P. 6, *supra.*) While that compact is not in issue in this case, a reading of its provisions will show that the complainant's contention is unsound and that the inference suggested by that contention, that Congress is there proposing an unfair apportionment of the water, is unwarranted. The complainant claims that it is now using 2,900,000 acre-feet from the Gila River and its tributaries. The proposed tri-state compact expressly assures to Arizona the exclusive beneficial use of all of that water. The Act assures to the Lower Basin a minimum average flow of

7,500,000 acre-feet in the main stream of the Colorado River at Lee Ferry. According to the bill (p. 8) 1,000,000 acre-feet enter the river between Lee Ferry and Laguna Dam, and this does not include water from the Gila River, which enters the Colorado River ten miles below Laguna Dam. (Bill, 7.) Of this minimum total of 8,500,000 acre-feet, the proposed tri-state compact would assign 300,000 acre-feet to the State of Nevada; California has agreed to accept a maximum of 4,400,000 acre-feet plus not more than one-half of any excess of surplus water unapportioned by said compact; and Arizona, which is now using 600,000 acre-feet from the main stream, is not restricted to that amount of water.

The complainant also cites a contract of the Secretary of the Interior with the Metropolitan Water District of Southern California for the delivery to that district of 1,050,000 acre-feet of stored water annually and says (Bill, 35) that—

> Said 1,050,000 acre-feet of water, together with the 6,500,000 acre-feet of water heretofore appropriated and now being used in said Lower Basin, will exceed the full amount of 7,500,000 acre-feet of water which said [Colorado River] compact attempts to apportion to said Lower Basin. The delivery of said 1,050,000 acre-feet of water to said District, as in said pretended contract provided, would exhaust said apportionment, and, by the terms of said Compact and of

said Boulder Canyon Project Act, no water would then be available for or subject to appropriation in said Lower Basin, although there would still remain in said Colorado River System 7,950,000 acre-feet of unappropriated water per year.

As already pointed out, the complainant is not stating correctly the amount of water which may be appropriated. It is not forbidden to make additional appropriations of water at the present time.

The complainant alleges that there are numerous sites which are suitable for the construction, maintenance, and operation of dams and reservoirs the development of which would long since have commenced but for the passage of the Boulder Canyon Project Act (Bill, 12); but the only site which it names is at Black Canyon, on the boundary line between Arizona and Nevada (Bill, 10); and the State does not show that it would be possible for anyone other than the United States to secure title to the land which would be used in the construction of a dam and reservoir at that site, nor that it would be possible for any permittee of the State of Arizona to construct a dam at that point, or at any other point on the river where it constitutes a boundary between two States, without the consent of a State which is a party to the Colorado River Compact, and which presumably would not grant such consent except in furtherance of the purposes of the Compact.

The first section of the Act (Bill, 58) declares that the law is enacted

> for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking. * * *

Section 6 (Bill, 68) provides:

> That the dam and reservoir provided for by section 1 hereof shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River Compact; and third, for power. * * *

Section 9 (Bill, 71) ordains:

> That all lands of the United States found by the Secretary of the Interior to be practicable of irrigation and reclamation by the irrigation works authorized herein shall be withdrawn from public entry.

The section then provides for the disposition of such lands in accordance with the provisions of the reclamation law.

The State contends that the Colorado River is not navigable below Black Canyon (Bill, 7, 31) and that a dam at that point, regulating the flow of water, would not be in aid of navigation.

The State also contends that over the waters of this boundary stream, even where it has political jurisdiction only to the middle of the stream (Constitution of Arizona, Article I), it can maintain against other States and against the United States the same control which it might maintain against its own citizens.

Arizona not having joined with the other States in the Compact seeks to enjoin the Secretary from carrying out the terms of the Act, including the construction of the dam and reservoir. If in the administration of the stored water the Secretary shall invade any rights of the State or its inhabitants to take water from the stream which has already been appropriated to beneficial uses or shall prevent the appropriation of unappropriated water to new uses, or if any such invasion of rights should be immediately threatened by the Secretary, perhaps Arizona would be entitled to equitable relief, but there are no allegations in the bill of complaint upon which the prayer for relief enjoining all action pursuant to the Act can be predicated.

SUMMARY OF ARGUMENT

This suit is brought in order to challenge the constitutionality of an Act of Congress. It involves the sovereign and property rights of the United

States. Therefore the United States is an essential party to the cause and the suit can not proceed in its absence.

The complainant does not control all of the water which flows through the State or along its borders. So far as the State or any of it inhabitants has perfected rights to water, such rights will not be interfered with by the execution of the Boulder Canyon Project Act and are legally secured by the provisions of that Act.

As to the making of additional appropriations of water by the State or its permittees, the complainant has not stated a case sufficiently concrete to constitute a justiciable controversy.

The Court is asked to take judicial notice of facts which show that the Colorado River below Black Canyon has been a navigable stream on which interstate commerce has been conducted and that the proposed developments will make the stream more navigable.

The United States owns large tracts of irrigable public lands and of irrigable lands of Indian reservations. As against Arizona it has the right to take water from the river for the benefit of those lands. It also has the right to deliver to the State of California as much water as that State might appropriate for itself. Congress has constitutional power to make appropriations for the public welfare. Under this power it has additional and very urgent reasons for undertaking control of the

waters of the Colorado River, holding in check behind the dam the huge floods which menace large tracts of land in the lower reaches of the Colorado basin. By storing water and releasing it gradually the Federal Government will not only improve navigation and render life and property safer in California and in Arizona, but will secure a revenue which will make this great undertaking self-supporting. The Boulder Canyon Project Act is consistent with the letter and the spirit of the Constitution.

ARGUMENT

I

THE UNITED STATES IS AN INDISPENSABLE PARTY TO THIS CAUSE. SUIT MAY NOT BE MAINTAINED WITHOUT MAKING IT A DEFENDANT; AND IT MAY NOT BE MADE A DEFENDANT WITHOUT ITS CONSENT.

This suit involves the right of the United States to impound water of the Colorado River for the purpose of improving navigation and in order to use a portion of that water for the reclamation of public lands. The United States is a necessary party to any final determination of its right to control the use of a stream, and especially so where it is claiming the right, as landowner, to appropriate that water to the use of itself and its grantees. *Morrison v. Work*, 266 U. S. 481, 485. An action to restrain the Secretary of the Interior from constructing the works authorized by Congress upon the ground that the State may forbid the United

States to impound water of a stream on the boundary of that State is in substance an action against the United States and one which may not be maintained without the consent of Congress.

In *Kansas* v. *Colorado*, 185 U. S. 125, where the complainant charged that the defendant had constructed reservoirs and was preparing to construct additional reservoirs to impound water which had been accustomed to flow into the complainant State, this Court said (p. 142):

> The action complained of is state action and not the action of state officers in abuse or excess of their powers.

In *Minnesota* v. *Hitchcock*, 185 U. S. 373, where the State sought to restrain the Secretary of the Interior from selling certain lands, the Court pointed out that, although the United States was not named as defendant, it must be considered a party to the controversy (p. 387):

> The legal title to these lands is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to divest the Government of its title and vest it in the State. The United States is, therefore, the real party affected by the judgment and against which in fact it will operate, and the officers have no pecuniary interest in the matter. If whether a suit is one

against a State is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered.

The Court exercised jurisdiction and decided the case upon the merits simply because Congress had consented to the maintenance of the suit. (Pp. 387, 388.)

In *Oregon* v. *Hitchcock*, 202 U. S. 60, 68, 69; *Louisiana* v. *Garfield*, 211 U. S. 70, 78; *Louisiana* v. *McAdoo*, 234 U. S. 627; *New Mexico* v. *Lane*, 243 U. S. 52, where the States had brought actions against officers of the United States, the Court held that the rights of the United States would be affected if the contentions of the States were sustained and that for that reason the actions could not be sustained without the consent of Congress. See also *Goldberg* v. *Daniels*, 231 U. S. 218, 221, 222; *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601. The United States may not be sued even by a State without its consent. "Public policy forbids that conclusion." *Kansas* v. *United States*, 204 U. S. 331, 342.

The cases are not confined to those which hold that where the United States is in possession of property a suit affecting its title may not be

brought. *Wells* v. *Roper*, 246 U. S. 335; *Louisiana* v. *McAdoo*, 234 U. S. 627, were cases in which the plaintiffs sought to interfere with the performance of official duties by officers of the United States, and the Court held that those suits which did not affect the title of the United States to property, were nevertheless in substance suits against the Federal Government.

So also in *North Dakota* v. *Chicago & Northwestern Ry. Co.*, 257 U. S. 485, where the State sought by an original bill to prevent certain railway companies from applying an order of the Interstate Commerce Commission until this Court could review the decree upon which that order was made, the Court decided that it would be inequitable to enter a decree except in such form as to bind the Interstate Commerce Commission and the United States, and as the United States had not consented to suit in this Court upon an original bill in such a case, the bill must be dismissed. To the same effect are *Texas* v. *Interstate Commerce Commission*, 258 U. S. 158, 164; *Lambert Run Coal Co.* v. *Baltimore & Ohio R. R. Co.*, 258 U. S. 377, 382.

Here the United States, by an Act of Congress, is claiming that as the owner of land whose title is not contested, it has the right to appropriate water from an interstate stream, and the State is contending that its sovereignty extends over that water in derogation of any rights of the United States. The United States, by Act of Congress, is claiming

the right to impound water in order to improve navigation, and the State is denying that the impounding of the water and the regulating of its flow are within the power of the United States. These and other issues involving the authority of the United States the State is seeking to have determined in the present case, although the United States is not a party thereto.

The allegations of the complaint do not support any assertion of tortious interference by the Secretary with any right upon which a cause of action against him as an individual can be predicated. In effect the complainant is seeking a declaratory judgment that an Act of Congress is unconstitutional.

II

NO VESTED RIGHTS OF THE COMPLAINANT OR OF ANY OF ITS CITIZENS WILL BE INVADED BY THE EXECUTION OF THE ACT

There are no allegations in the complaint that any existing or vested right has been invaded or is presently threatened.

By their own terms both the Act and the Compact are subordinated to all such rights (Colorado River Compact, Art. 8, Bill, p. 56; Boulder Canyon Project Act, Secs. 6 and 18, Bill, pp. 68 and 77); nor is there any interference, actual or threatened, with the right of Arizona, or her inhabitants, to make appropriation from the unappropriated waters of the Colorado River.

On the contrary, the allegations, when read in connection with the Act and the Compact upon which they are predicated, disclose that California has agreed to limit the total appropriations from the flow of 7,500,000 acre-feet of water at Lee Ferry and the additional flow of 1,000,000 acre-feet which enters the river between Lee Ferry and Laguna Dam within her jurisdiction to 4,900,000 acre-feet, leaving 3,600,000 to satisfy present diversions from the main stream in Arizona not exceeding 600,000 acre-feet. The balance of 3,000,000 acre-feet in the main stream thus will remain to satisfy present and future uses in Nevada and future appropriations in Arizona. If Arizona's contentions are correct, the entire unappropriated flow of the stream is now and will continue until appropriation by others to be subject to appropriation by her citizens without regard to the terms of the Compact to which she is not a party. Until the dam has been built and the right of the State of Arizona or her citizens to make appropriations adequate to her existing needs has been invaded, or is presently threatened, there can be no basis for relief.

We are not unmindful of the allegations contained in paragraph XXX of the complaint, reading as follows:

> Pursuant to and under color of said act, said defendant has seized and taken possession of all that part of the Colorado River

which flows in Arizona and on the boundary thereof, and all of the water flowing in said river, including the 8,000,000 acre-feet of unappropriated water now flowing therein, and all of the dam sites and reservoir sites mentioned in paragraph X hereof, and now has said river, said water and said sites in his possession; has excluded and is now excluding the State of Arizona, its citizens, inhabitants and property owners from said river, said water and said sites, and from all access thereto; has prevented and is now preventing said State, its citizens, inhabitants and property owners from appropriating any of said 8,000,000 acre-feet of unappropriated water, all of which is now subject to appropriation in Arizona; has thereby prevented and is now preventing the irrigation of the land in the irrigation projects mentioned in paragraph XI hereof; and, unless enjoined therefrom, will continue so to do.

To support such vague assertions we submit there should be some statement of the rights which the Secretary is thus alleged to be invading. The only dam site mentioned in paragraph X is the site at Black Canyon, where a dam is to be constructed by the Secretary of the Interior under authority of Section 1 of the Boulder Canyon Act. Paragraph X refers to other dam sites on the Colorado River without mentioning the locality of any of them. Paragraph XI refers to irrigation projects without mentioning their locality, and alleges that

in order to develop these projects it will be necessary to construct dams and reservoirs and for this purpose to use the dam sites and reservoir sites mentioned in paragraph X. But the bill of complaint fails to allege that the title to any of the sites is not in the United States or that the State or any of its inhabitants has any title thereto. Thus the possession of these sites by the Secretary, and the exclusion of others therefrom, is not shown to be wrongful or to be an interference with any existing or vested right. The allegation that the Secretary of the Interior is excluding the State, its citizens, inhabitants, and property owners, from all access to the River and preventing their appropriation of unappropriated water is not predicated upon any claim of right or supported by any statement of facts upon which any right of access or possession can be based. The acts complained of are all alleged to have been pursuant to and under color of the Boulder Canyon Project Act. This Act and the Compact expressly recognize all existing rights to take water from the Colorado River and its tributaries. That these allegations of paragraph XXX are not intended to charge any actual or threatened invasion of presently existing rights is apparent from the prayer for relief, which seeks only a decree that the Compact and the Act be declared to be void because unconstitutional, and that the defendants be enjoined from carrying out their provisions and the pro-

visions of the contracts made pursuant to the Act. The whole burden of the complaint is that the appropriations of water authorized by the Compact and the Act will exclude others from using the water thus appropriated, if and when the balance of the stream has also been appropriated.

The appropriations of water which are about to be made under the Act do not deprive the State of Arizona or any of its inhabitants of any water to which it is now entitled and do not prevent the State or its inhabitants from making additional and substantial appropriations of water in the future.

Where the thread of the river constitutes the boundary between two States neither State may reserve to itself all the water from the stream for future appropriation.

The fact that a neighbor State proposes to divert to another watershed a portion of the water to which it is entitled is not material. Such diversions have been recognized as valid by this Court (*Wyoming* v. *Colorado*, 259 U. S. 419, 466; and see *Missouri* v. *Illinois*, 200 U. S. 496, 526), and they are so recognized by the six States parties to the Colorado River Compact (Art. II (f), (g); Bill, 52) with the approval of Congress. (Boulder Canyon Project Act, Sec. 13 (a), Bill, 74.)

So far as the United States proposes to divert water not theretofore appropriated, and to use it

for the reclamation and irrigation of public lands, it can not be restrained by Arizona within whose borders those lands are situated and under whose Organic Act such rights were expressly reserved. (*United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 703; Enabling Act: Act of June 20, 1910, c. 310, sec. 20, 28, 36 Stat. 557, 570, 575.) The United States may make use of its property for such purposes regardless of the wishes of the State. *Winters* v. *United States*, 207 U. S. 564, 577. See also *Stearns* v. *Minnesota*, 179 U. S. 223, 245; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 403, 404; *United States* v. *Holt State Bank*, 270 U. S. 49, 54, 55; *Hunt* v. *United States*, 278 U. S. 96, 100.

And so far as Congress orders the erection of structures in a stream for the facilitation of interstate navigation or for flood control of such a stream, it is empowered to do so by the Constitution of the United States. *Gibson* v. *United States*, 166 U. S. 269; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251; *Cubbins* v. *Mississippi River Commn.*, 241 U. S. 351, 369. See also *Sanitary District of Chicago* v. *United States*, 266 U. S. 405, 426.

Where the land to be protected by flood control is the property of the United States, Congress undoubtedly has power to regulate the flow of the stream.

It follows that the complaint, which merely alleges that the United States and other States in the Colorado River Basin are proposing to appropriate the unappropriated waters of the Colorado River to beneficial uses, can not be sustained when no actual or presently threatened invasion of any existing or vested right is alleged. Upon the allegations of the bill it is apparent that this suit begins where the suit brought by Kansas against Colorado ended—that is, with failure to show any injury, actual or threatened, which can justify the intervention of a court of equity. *Kansas* v. *Colorado*, 206 U. S. 46, 117.

III

IN FAILING TO ALLEGE ANY ACTUAL OR THREATENED INTERFERENCE WITH ANY EXISTING RIGHT OF THE COMPLAINANT, THE BILL OF COMPLAINT PRESENTS ONLY ABSTRACT QUESTIONS WHICH MAY NEVER ARISE IN ANY JUSTICIABLE CASE OR CONTROVERSY

The bill of complaint proceeds upon the basic theory that Arizona, not being a party to the Compact, is not bound by its terms, but that the Secretary of the Interior is proceeding under the Boulder Canyon Project Act to enforce the Compact against Arizona, and is thus interfering with the right of Arizona and her inhabitants to make appropriations of water from the unappropriated flow of the Colorado River. But if Arizona is not bound by the Compact she and her permittees may

make appropriations to beneficial uses under her laws at any point on the river where rightful access to the stream may be had. No invasion of this alleged right, actual or threatened, can be predicated upon the allegations of the complaint.

It is true that the complaint alleges (Bill, 10, 12) that but for the passage of the Act water would be diverted from the Colorado River under state authority; but the only place of taking named by the complainant is in Black Canyon, and the State does not allege facts the existence of which is prerequisite to any authorized taking of water from the stream at that point by any permittee of the State of Arizona. See p. 10, *supra*. In view of the facts that where the stream flows through the State of Arizona it flows through deep canyons (Bill, 6), in national parks and other reservations of the United States, and that where it is a boundary stream it would not be feasible to construct a storage and diversion dam without the consent of a State which is a party to the Colorado River Compact and which presumably would not grant consent except in furtherance of the purposes of that Compact, it may be doubted whether the State can make specific allegations of feasible plans for the diversion of more unappropriated water than is allotted to it under the Act and the Compact. Certainly the complainant has not yet alleged specific facts which, if proved, would entitle it to the injunction for which it prays.

This Court has said repeatedly that it will not consider merely abstract questions. *New York* v. *Illinois*, 274 U. S. 488, 489, 490; *New Jersey* v. *Sargent*, 269 U. S. 328, and cases there cited. It will not consider a complaint unless there are definite allegations of fact which, if true, show that rights are being invaded or immediately threatened. In any case the giving of advisory opinions would be beyond the jurisdiction of the Court; and this rule is applied with as much strictness where the original jurisdiction is invoked in a controversy between States as in cases within the appellate jurisdiction of the Court.

IV

CONGRESS HAS POWER UNDER THE COMMERCE CLAUSE TO ORDER THE CONSTRUCTION OF THE DAM AT BLACK CANYON

Section 1 of the Act (Bill, 58) declares that the law is enacted

> for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking * * *

Section 6 (Bill, 68) provides:

> That the dam and reservoir provided for by section 1 hereof shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River Compact; and third, for power. * * *

The complainant alleges (p. 7):

> That part of the Colorado River which flows on the boundary between Arizona and California and between Arizona and Mexico flows between comparatively low banks, is therefore easily accessible, and is comparatively free from rapids and cataracts, but is obstructed by numerous sand-bars and is too shallow to permit of navigation. Said river carries great quantities of silt, which are constantly being deposited within and upon the bed thereof, and which, while so carried and after being so deposited, constitute a further obstacle to the navigation of said river. Another obstacle to the navigation of said river has resulted from the construction of said Laguna Dam by the Government of the United States, and the diversion of great quantities of water from said river for irrigation and other purposes. Because of said conditions, said river has never been, and is not now, a navigable river.

It is further alleged that the Colorado River flows for a distance of 235 miles on the boundary between Arizona and California and that Laguna Dam is eighteen miles above the point where the river becomes the boundary between Arizona and Mexico. (Bill, p. 4.) Thus it appears that for over 200 miles above Laguna Dam the river flows between comparatively low banks, is easily accessible and is comparatively free from rapids and cataracts, but it is alleged to be obstructed by sand bars and to be too shallow to permit of navigation. Great quantities of silt, after being deposited in this stretch of the river, are alleged to constitute a further obstacle to the navigation thereof." From these allegations it thus appears that the river throughout this distance is easily susceptible of improvement for the purposes of navigation if the sand bars and deposits of silt can be removed. The construction of the Dam will, of course, prevent additional deposits of silt. The enormous flow of the stream, relieved of its silt, will before long clear the channel of sand bars and of prior silt deposits.

The conclusion of paragraph VI quoted *supra* is that the river, including that portion of it which forms the boundary between California and Arizona, "has never been, and is not now, a navigable river." This conclusion, insofar as it relates to the portion of the river which forms the boundary between California and Arizona, is based upon the allegations above quoted relating to the obstruc-

tion of navigation by reason of silt deposits, and it can have no broader significance than the allegations of existing conditions upon which it is predicated. Furthermore, the defendant asks the Court to take judicial notice of the fact that that portion of the Colorado River has been and is now navigable and that its navigability will be increased by the regulation of the flow of water which is proposed.

The navigability of the Colorado between Laguna Dam and Callville has been repeatedly recognized by Congress and by Territorial and State legislatures. Until this Bill was filed its navigability, so far as we have been able to ascertain, has never been questioned. The authorities in Arizona prior to the commencement of this litigation have consistently asserted its navigability. And so we submit that its navigability below the proposed dam is a matter so notorious as not to require proof, and to be clearly within the knowledge of the Court.

Facts as to past and present navigability of the stream are set forth in an appendix to this brief.

The aid to be given by the dam in improving navigability is obvious. A reservoir of 29,500,000 acre-feet capacity (Bill, 89) will hold the water of a river whose average annual flow is alleged to be 18,000,000 acre-feet (Bill, 7). This reservoir will hold back water during time of flood and will allow an increased minimum flow at other seasons of the year. As shown by a report which was transmitted

to Congress a few weeks before the enactment of the Boulder Canyon Project Act (Report of the Colorado River Board of Engineers on the Boulder Dam Project, 1928. House Document No. 446, 70th Cong., 2d Sess., p. 13), the silt which is flowing along with the water at the present time will be retained in the reservoir, being deposited there at the rate of approximately 137,000 acre-feet per year, and the desilted water, flowing with regularity in the channel of the lower river, will steadily improve the condition of that channel. Such developments will unquestionably increase the navigability of the river.

This Court may take judicial notice of the navigability of the stream. As it said in *The Montello*, 11 Wall. 411, 414:

> We are supposed to know judicially the principal features of the geography of our country and, as a part of it, what streams are public navigable waters of the United States.

It said in *Muller* v. *Oregon*, 208 U. S. 412, 421:

> We take judicial cognisance of all matters of general knowledge.

To the same effect are *The Planter*, 7 Pet. 324, 342; *Brown* v. *Piper*, 91 U. S. 37, 42; *Brown* v. *Spilman*, 155 U. S. 665, 670; *United States* v. *Thornton*, 160 U. S. 654, 658, 659; *Louisville Trust Co.* v. *Louisville, N. A. & C. Ry. Co.*, 174 U. S. 674, 683; *United States* v. *Rio Grande Dam & Irr. Co.*, 174

U. S. 690, 696–698; *Cubbins* v. *Mississippi River Comm.*, 241 U. S. 351, 367; *Carroll* v. *United States*, 267 U. S. 132, 159, 160. And in *Brown* v. *Piper*, 91 U. S. 37, 42, it held:

> If the judge's memory is at fault he may refresh it by resorting to any means for that purpose which he may deem safe and proper.

When facts are averred which run counter to facts of which the Court takes judicial notice, the averments are disregarded. *Jones* v. *United States*, 137 U. S. 202, 215; *Pearcy* v. *Stranahan*, 205 U. S. 257, 263; *Middlesex Transportation Co.* v. *Pennsylvania R. Co.*, 82 N. J. E. 550, 553; *Heiskell* v. *Knox County*, 132 Tenn. 180, 186; see also *McSween* v. *State Live Stock Board*, 97 Fla. 750, 774.

Even though there is but little if any transportation on the river at the present time, Congress has not lost its power to improve the stream. In *Economy Light & Power Co.* v. *United States*, 256 U. S. 113, 124, this Court said:

> The Desplaines River, after being of practical service as a highway of commerce for a century and a half, fell into disuse, partly through changes in the course of trade or methods of navigation, or changes in its own condition, partly as the result of artificial obstructions. In consequence, it has been out of use for a hundred years; but a hundred years is a brief space in the life of a nation; improvements in the methods of water transportation or increased

> cost in other methods of transportation may restore the usefulness of this stream; since it is a natural interstate waterway, it is within the power of Congress to improve it at the public expense; and it is not difficult to believe that many other streams are in like condition and require only the exertion of federal control to make them again important avenues of commerce among the States. If they are to be abandoned, it is for Congress, not the courts, so to declare.

We have already (p. 23, *supra*) cited authorities for the proposition that Congress may erect structures in a river in order to improve its navigability.

The Act declares (Sec. 6, Bill, p. 68):

> That the Dam and reservoir provided for by Section I hereof shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article 8 of said Colorado River Compact; and third, for power.

In the face of this mandatory declaration of purpose, to say that purposes other than the improvement of navigation are to be served by the construction of the dam and reservoir will not suffice to defeat the Act as one beyond the power of Congress. Congress might properly give weight to the fact that by the same measures it would secure additional desirable results without thereby infringing upon any rights of the complainant.

It is true that in the Compact the States, which were considering the river as a whole, said that it had ceased to be navigable and that the use of its waters for purposes of navigation should be subservient to other uses; but the power of Congress to deal with it as a navigable stream was clearly recognized (Article IV of the Compact, Bill of Complainant, p. 50) so far as the river below the dam is concerned. Congress has declared that its navigability is to be improved and its floods controlled by the construction of the dam. Other uses of the water may be made to the extent which Congress has authorized in the Act; but such uses are not inconsistent with the intent of Congress to improve navigability, for Congress doubtless knew that while provision is made for appropriations of water into the distant future there will always be a substantial flow of water in the lower reaches of the river if only to satisfy the rights of appropriators in southern Arizona, in the Imperial Valley of California, and, if any, in Mexico. And Congress knew, of course, that the use of the water for the generation of electrical energy would not reduce the flow of the stream.

Clearly the allegation of the Complaint (p. 31): "The recital in said act [Boulder Canyon Project Act] that the purpose thereof is the improvement of navigation and the reclamation of public land is a mere subterfuge and false pretense," must be disregarded in the face of the statute, the facts

alleged in the complaint, and the facts of which this Court will take judicial notice.

V

REGARDLESS OF THE POWER OF CONGRESS UNDER THE COMMERCE CLAUSE, THE ACT IS CONSTITUTIONAL

The United States is the owner of nearly six hundred square miles of irrigable public lands and Indian reservations along and near the shores of the Colorado River in Arizona (Senate Doc. No. 142, 67th Cong., 2d Sess., pp. 47–80) and in California. (Same, pp. 13, 15.) As such owner it is entitled to impound water, to regulate its flow, and to consume a portion of it. *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 703. It is obvious that where the flow of a river varies greatly in volume from season to season the total supply of water will be best utilized by impounding a large part of the flow in time of flood and by releasing it gradually at other times.[1]

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[1] From Report of Colorado River Board, House Doc. No. 446, 70th Cong., 2d Sess., p. 1:

"Its main flow is derived from the melting of snow on the mountains of the upper basin. The principal characteristics of its flow are low waters during the autumn and winter months, with a normal flood from the melting snows, usually beginning late in April, reaching its maximum in June, and ending by the middle of August. This flow is modified and intensified by torrential floods of short duration, which come in general from its southern tributaries, and may occur during almost any month of the spring, fall, or winter. Its flood flows afford by far the greater quantity of water produced by the stream, and must be conserved and impounded in order to be successfully utilized for water supply and power production."

The State of California, whose jurisdiction extends to the middle of the Colorado River, is entitled to receive water from that stream. It is submitted that the Government may properly release to the State as much water as the State is entitled to appropriate. Part of the water is to be turned over to the Metropolitan Water District of Southern California under a contract by which the District will pay for water which has been stored behind Hoover Dam something towards recouping the cost of constructing the reservoir. This is justified as a reasonable charge for storing and releasing the water. Part of the water will be diverted from the river near Laguna Dam, where appropriation rights have already been established and where there are also both public and Indian lands. Senate Doc. No. 142, 67th Cong., 2d Sess., pp. 13, 15. Unless the Government is undertaking to supply to California more water than that State is entitled to appropriate, the approval of the State of California is sufficient justification for this diversion.

The flow of water is to be regulated and the water desilted, not only to improve navigation but in order to save the Yuma, Palo Verde, and Imperial Valleys from destruction. As shown in the reports of the Reclamation Service and of committees of the Senate and House of Representatives of the United States (see Appendix B), the Imperial Valley, with a population of 65,000 persons and with property values of over $100,000,000,

lies from one hundred to three hundred feet below the channel of the river. If the river breaks through into the valley, the water will have no outlet but will remain there until taken out by the slow process of evaporation. Each season, because of silt deposits, the bed of the river rises higher. The river "is restrained by dykes and levees. The height of these levees has been constantly increased until to-day they are built to the danger point and can not be built higher." Storage of flood waters, with removal of the silt in the storage reservoir, constitutes the only remedy.

> An outstanding feature of the testimony before the committee was the unanimity of view respecting the existence of the flood danger, its seriousness, urgent need for quick action, and that storage up the river was the solution. Engineers like A. P. Davis, F. E. Weymouth, Gen. George Goethals, and William Mulholland joined with responsible executive officials like Mr. Herbert Hoover in voicing this idea. Admittedly and concededly, storage at Boulder Canyon as here authorized will effect the greatest measure of security against the river's floods which may be obtained. (Appendix B.)

Even where Congress has no power to enact regulatory legislation as to a subject matter, it may make appropriations for the public welfare. It has done so ever since the earliest years of the country's history. The power of Congress to do

so was discussed at length in the Government's brief in *Massachusetts* v. *Mellon*, 262 U. S. 447. It is too well established to require further attention from the Court. Even if the dam were to be erected solely in order to save the Imperial Valley from destruction, the Boulder Canyon Project Act would be constitutional.

And if by storing water and releasing it gradually the Federal Government will not only improve navigation and render life and property safer in California and in Arizona but will secure a revenue which will make this great undertaking self-supporting, it will be adopting measures which are not prohibited but are consistent with the letter and the spirit of the Constitution and reasonably necessary to the exercise of the powers delegated to Congress.

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JANUARY, 1931.

APPENDIX A

The Navigability of the Colorado River

On November 3, 1864 (Laws of Arizona Territory, p. 24), the territorial legislature of Arizona granted a franchise to maintain a ferry across the Colorado River at Mojave; on November 7 (p. 36), it granted a franchise for a ferry across the Colorado River at La Paz, and on November 9 of that year (p. 79) it adopted a memorial to Congress saying that the Colorado River was the only navigable water in the Territory and asking Congress to make an appropriation of $150,000 for the improvement of its navigation, declaring that the river was the channel through which nearly all imports and exports must pass to supply the middle and northern portions of the Territory; that the river was navigable in high stages of water for five hundred miles, and that by the expenditure of a small amount of money the river might be made navigable as far up as Virgin River.

On December 28, 1865 (p. 77), the territorial legislature declared to Congress that the river was navigable and asked for an appropriation of $150,000 to improve navigation to Callville.

In 1866 (p. 61) it adopted a resolution saying that the Colorado River had been successfully navigated to Callville. On November 5 of that year (pp. 67, 68) it adopted a memorial in which it told Congress that the Colorado River had been—

> justly styled the Mississippi of the Pacific. By this great river the Territory receives the

> most of its supplies, and lately it has become the channel of a large part of the trade of San Francisco with Utah and Montana.

On February 14, 1871 (p. 52), the ferry act of November 7, 1864, was amended.

On March 6, 1882 (p. 301), the Arizona legislature declared that the Colorado River was navigable to the junction of the Virgin and Colorado Rivers at Rioville during the highest stages of water and asked Congress to appropriate $125,000, saying that—

> At proportionately small outlay asked by your petitioners, said Colorado River could be made, by the removal of obstructions, navigable during all seasons of the year for light tonnage crafts of all kinds to a point thirty miles above Rioville, which can be verified by any practical and unprejudiced engineer.

By Act of July 5, 1884, c. 229, 23 Stat. 133, 144, Congress appropriated $25,000 for the improvement of the Colorado River between Fort Yuma and a point thirty miles above Rioville.

On February 21, 1885 (p. 367), the territorial legislature of Arizona repeated the request set forth in the memorial of 1883 in the same terms except that the request was then made for $100,000.

In 1889 (p. 109) the territorial legislature repeated, in the same terms, the request made in 1883, again asking for an appropriation of $125,000.

In 1903 (p. 170) the Arizona House of Representatives asked Congress to construct a levee from Yuma along the east bank of the Colorado River to the Mexican border. It said:

These lands are as fertile as those of the historic valley of the Nile. They lie in a semitropical climate where date palms and fig trees, the olive, the orange, and the lemon flourish, and the air is filled with the scent of new-mown hay in December.

They are the natural source of food supply for a mining and grazing region extending over thousands of square miles.

A levee which would protect these lands would also be a great benefit to navigation. The Colorado river is the third greatest river of the United States, draining as it does, over one-third of the country lying between the State of Kansas and the Pacific Ocean.

Its depth at Yuma during low water is sixteen feet; during high water, which lasts throughout the months of May, June, July, and August, twenty-five feet. *It is navigable for a distance of six hundred and forty miles. No river on the entire western slope of the New World, unless it be the Yukon, has such an extent of navigable channel.*

Though *this river has been navigated constantly for the last half century,* yet not one dollar has been appropriated toward the improvement of this the natural highway for a vast extent of the Territory.

Therefore, for the benefit of navigation upon this great river, for the improvement of one of the most fertile regions of the world, and for the protection of the settlers from ruinous floods, we petition your honorable body that you do pass H. R. No. 8594 appropriating $100,000 for the construction of a levee from the Town of Yuma in Arizona along the east bank of the Colorado River to the northern boundary of Mexico.

In 1909 the Territorial Legislature (p. 301) adopted a memorial to Congress in which it said:

> That for many years the said navigable right was put to great use and was of much benefit to the citizens of Arizona, and was in fact the only means of transportation by which they could get in their supplies and ship out mineral and other export products; that with the advent of the railroad, owing to the then sparsely settled conditions of the Territory, navigation on the river became unprofitable and was practically abandoned in so far as it consisted in navigating the Colorado River to its mouth at the Gulf of California, but did continue and still continues along nearly the whole western boundary of the Territory. * * *
>
> That the navigable way down the Colorado River, from Yuma to the Gulf of California, has, through the lack of use and proper government attention and control, became somewhat unfitted for navigation by boats of anything like heavy draught; that Arizona with its wonderful natural resources now in the infancy of their development can, by the benefit of water transportation and the low competitive rates of transportation resulting therefrom, develop its vast resources and take its place among the wealthy sections of the Union.
>
> Wherefore, your memorialists most earnestly request your serious consideration to the end that governmental aid be had, proper investigations instituted and sufficient appropriations made to dredge, protect, and control the channel of the Colorado River from Yuma, in the Territory of Arizona, to the Gulf of California, and thus conserve, perpetuate, and make useful and of benefit for this generation and for posterity *the most valuable of our Territory's*

natural resources—our right of navigation over the Colorado River and the Gulf of California.

At the same session (p. 306) the legislature asked Congress to appropriate $200,000 for the construction of a wagon bridge across the Colorado River at Yuma. It said:

> The Colorado River is the boundary line between the Territory of Arizona on the east and the States of Nevada and California on the west and is a navigable stream and under the direct control of the Government of the United States.

On January 12, 1925 (Session Laws of Arizona, 1925, p. 524), the present Governor of Arizona declared in a message to the legislature of that State that

> Assertions have been made from time to time as to the rights of Arizona in the Colorado River. This river is recognized as a navigable stream.

See also the reports of the Territorial Governors to the Secretary of the Interior on September 1, 1893 (53d Cong., 2d Sess. H. R. Exec. Doc. 1, pt. 5, vol. 3, pp. 337, 338, 339); September 25, 1894 (53d Cong., 3d Sess. H. R. Ex. Doc. 1, pt. 5, vol. 3, p. 388); September 26, 1895 (Report of Governor of Arizona to Secretary of Interior, Government Printing Office, 1895, p. 61); October 17, 1896 (Report of Governor of Arizona to Secretary of Interior, Government Printing Office, 1896, pp. 137, 139); August 31, 1898 (Report of Governor, 1898, pp. 12, 72, 73); September 1, 1899 (Report of Governor, 1899, pp. 214, 216); the statements of Congressman Hayden, of Arizona, before the Committee on Irrigation and Reclamation of the House

of Representatives, 69th Cong., 1st session, on H. R. 6251 and H. R. 9828, Part 1, pp. 77, 104, 106, 107, 140, 141; and the statements of Governor Hunt of Arizona before the Senate Committee on Irrigation and Reclamation, 70th Cong., 1st Sess., on S. 728 and S. 1274, pp. 28, 30.

See also Sloan, History of Arizona, 1930, vol. 1, chap. 14; Farish, History of Arizona, vol. 3, p. 114, vol. 4, p. 14; New International Encyclopedia, 2d ed., vol. 5, p. 620; Dellenbaugh, The Romance of the Colorado River, 142, 152–156, 173; McClintock, Mormon Settlement in Arizona, 110; McClintock, History of Arizona, I, 302–305, II, 330, 559; Freeman, The Colorado River, 146, 159, 167; Bancroft, History of Arizona and New Mexico, 489, 494, 499, 601; Hodge, Arizona As It Is, 35, 143, 156, 208; Rusling, Across America, 355; Hinton, Handbook of Arizona, 66, 372; Hamilton, Resources of Arizona, 2d ed., 56, 213; Bishop, Old Mexico and Her Lost Provinces, 475; Robinson, Story of Arizona, 109.

The statutes of Arizona provide for the punishment of any offense which may be committed on board a vessel navigating a river. (Revised Code of Arizona, 1928, sec. 4921.) The Colorado River is the largest river with which the State of Arizona is acquainted.

Joint resolutions of the Nevada legislature also asserted the navigability of the Colorado River. Statutes of Nevada, 1869, p. 296; 1881, p. 187; 1883, p. 184.

By several Acts of Congress (Acts of June 30, 1913, c. 4, 38 Stat., 77, 85; Aug. 1, 1914, c. 222, 38 Stat. 582, 588; August 23, 1916, c. 400, 39 Stat. 533; January 24, 1923, c. 37, 42 Stat. 1172; March 3, 1925,

c. 452, 43 Stat. 1130; May 3, 1926, c. 225, 44 Stat. 387) authority was given for the construction of bridges over the Colorado River; but in each case the law provided that the bridge was to be maintained and constructed in accordance with the provisions of the Act regulating the construction of bridges over navigable waters.

Before the enactment of the Boulder Canyon Project Act extensive investigations were made. The Director of the United States Reclamation Service rendered an elaborate report which was transmitted to the Senate on February 28, 1922, and published as Senate Document No. 142, 67th Cong., 2d sess. It opens with this statement:

> The control of the floods and development of the resources of the Colorado River are peculiarly national problems for several good reasons.
>
> 1. The Colorado River is international.
>
> 2. The stream and many of its tributaries are interstate.
>
> 3. *It is a navigable river.*
>
> 4. Its waters may be made to serve large areas of public lands naturally desert in character.
>
> 5. Its problems are of such magnitude as to be beyond the reach of other than national solution.

The Committee on Irrigation and Reclamation of the House of Representatives, which had held hearings, filed a report on March 15, 1928, in which it said (House Report No. 918, 70th Cong., 1st sess., p. 22):

> While the navigability of the Colorado River has not been judicially determined evidence has been presented which would tend toward the conclusion that the river is

navigable as a matter of law. The proposed dam would improve navigation probably more than any other works which could be constructed. The dam will so regulate the flow as to make the river very practicable of navigation for 200 miles below and impound water above which could easily be navigated for more than 75 miles. The rights of the United States under the commerce clause of the Constitution to construct works in a navigable stream to improve navigation is settled beyond all possible question. It is also brought to the attention of the committee that there are two transcontinental railroads and three "Federal aid" transcontinental highways crossing the river below the Boulder Dam site. These five interstate lines of commerce would be safeguarded against the possibility of destruction by floods on the river by the construction of the proposed dam. The commerce clause of the Constitution refers to commerce by land as well as by water.

The Senate's Committee on Irrigation and Reclamation, which had also held extensive hearings, reported on March 20, 1928 (Senate Report No. 592, 70th Cong., 1st Sess., p. 8):

> The construction of the dam in addition to providing efficient flood control and making available the flood waters for irrigation and domestic uses, will fully regulate the flow of the river. With its flow unregulated, the river can not be successfully used as a highway for commerce; in its regulated form it will provide a safe and dependable flow below the dam that can be used by power boats and other small craft. The reservoir created by the dam will be the largest artificial lake in the United States and capable of successful navigation.

APPENDIX B

Flood Control

From Report of Director of Reclamation Service, 1922, Senate Doc. No. 142, 67th Cong., 2d Sess., pp. 7, 8, 20:

Owing to the gradual upbuilding of its deltaic bed and banks the flood menace from the Colorado River is an increasing and ever-recurring problem of great importance.

The Gulf of California formerly extended northwestward to a point a few miles above the town of Indio, about 144 miles from the present head of the gulf. The Colorado River, emptying into the gulf a short distance south of the present international boundary, carried its heavy load of silt into the gulf for centuries, gradually building up a great delta cone entirely across the gulf and cutting off its northern end, which remains as a great depression from which most of the water has been evaporated, leaving in its bottom the Salton Sea of 300 square miles, with its surface about 250 feet below sea level.

The river flowing over its delta cone steadily deposits silt in its channel and by overflow on its immediate banks, so that it gradually builds up its channel and its banks and forms a ridge growing higher and higher until the stream becomes so unstable that it breaks its banks in the high-water period and follows some other course. In this manner the stream has in past centuries

swung back and forth over its delta, until this exists as a broad, flat ridge between the gulf and the Salton Sea, about 30 feet above sea level, and on the summit of this has formed a small lake, called Volcano Lake, into which the river flows at present, the water then finding its way to the southward into the gulf.

The direct distance from Andrade on the Colorado River, where it reaches Mexico, to the head of the gulf is about 75 miles, and the distance to the margin of Salton Sea is but little more. As the latter is about 250 feet lower than the gulf, the strong tendency to flow in that direction needs no demonstration. This, coupled with the inevitable necessity for such an alluvial stream to leave its channel at intervals, constitutes the menace of the lands lying about Salton Sea, called the Imperial Valley. As there is no escape of water from Salton Sea except by evaporation, the river flowing into this sea would, unless diverted, gradually fill it to sea level or above and submerge the cultivated land and the towns of Imperial Valley, nearly all of which are below sea level. Any flood waters that overflow the bank to the north must therefore without fail be restrained and not allowed to flow northward into Salton Sea. This is now prevented by a large levee, north of Volcano Lake, extending eastward and connecting with high land near Andrade. This levee is in Mexico and its maintenance is complicated thereby.

In 1905 the river scoured out the channel of the Imperial Canal and turned its entire volume into the Salton Basin, eroding a deep gorge and raising the level of Salton Sea. It submerged the salt works and forced the removal of the main line of the Southern Pacific Railroad. At great diffi-

culty and expense, after several unsuccessful attempts, the river was returned to its old channel in February, 1907. The control of the river would be greatly facilitated if the floods were reduced in volume by storage. Investigations have been made concerning the feasibility of storing the floods and reducing their volume to an amount easily controlled. * * *

One of the great problems concerning the Colorado is that of silt. The Boulder Canyon dam as planned would store the silt for over three centuries, if all were caught and held, and for nearly a century before greatly impairing its water-storage function. It is hoped before that time that other developments above will so regulate the flow that not all of its storage capacity will be needed, but it will always be desirable to control the floods of the region between Boulder Canyon and Glen Canyon, and before the capacity of the Boulder Canyon is entirely destroyed the Glen Canyon regulator can be built to take its place. It will then be fresh and empty of silt and will last to as much later date as the age of the Boulder Canyon reservoir at that time and will, therefore, solve the silt problem for a period of two or three hundred years further into the future than if it is built first, and can, if desired, be employed as a sluicing agency for sluicing out the Boulder Canyon reservoir.

From Report of House Committee on Irrigation and Reclamation, 1928, House Report No. 918, 70th Cong., 1st Sess., pp. 5, 15-17:

Imperial Valley has a population of 65,000 people, six well built, incorporated cities, besides several unincorporated towns, over

400,000 acres of cultivated farms, and property values of over $100,000,000. * * *

PART IV. FLOOD CONTROL

Throughout all the years of hearings on this development there has been expressed by all witnesses who have appeared before the committee an absolute unanimity of view respecting the existence of flood danger in the lower Colorado River, the urgent need for quick action, and that large storage up the river is the only permanent solution of the flood problem. There has also been a like unanimity of opinion that the construction of the dam and storage at Boulder or Black Canyon, as here authorized, would furnish as complete a solution of the flood danger of the river as could possibly be accomplished.

This unanimity of sentiment was to be expected in view of the physical characteristics of the river, and particularly in view of the physical characteristics and situation of Imperial Valley in respect to the Colorado. Here is a great valley, with 450,000 acres of irrigated farms and with populous cities, lying in a great depression or sink from 100 to 300 feet below the channel of the river. The slope toward the valley is much greater than the slope toward the gulf. Of course the river at any flood time may break from its shifting and uncertain channel and turn into the valley. The flooding of Imperial Valley would not be like the flooding of other sections, where property damage and perhaps loss of life result, but where soon the water subsides. If the Colorado once breaks into the valley and is not returned to its channel, it means its permanent inundation, there being no outlet for the

water. The danger, ever present, of a great flood has led every responsible Government official who has ever studied the situation to promptly and earnestly recommend immediate steps to remove the danger of such a catastrophe.

LEVEES FURNISH INSUFFICIENT PROTECTION

Efforts toward the protection of Imperial Valley have been made through the construction of levees, with only partial success. In 1905 the river broke into Imperial Valley, and it took two years of heroic efforts and great expense to return the river to its channel toward the Gulf. The United States then expended approximately $1,000,000 in building what was known as Ockerson Levee in Mexico. Hardly was this levee completed until it was washed away. The river, which theretofore had been flowing almost due southward along the foot of a plateau in Arizona and Mexico, turned westward toward the Volcano Lake region, still in Mexican territory, but in a lower depression on the delta. The river was kept in this course by an extensive levee system built by the people of Imperial Valley. Gradually, however, this depression filled up. The Imperial irrigation district then, at an expense of approximately $700,000, directed the river through what is known as the Pescadero Cut into a triangular depression lying between the old river channel on the east and the Volcano Lake region on the north and west. This is the one remaining depression on the surface of this delta into which the river can be directed.

The Imperial irrigation district is compelled to maintain a large and expensive organization for the building and mainte-

nance of levees in Mexico. It has built 78 miles of these levees. The district has 60 miles of railroad, trains of dump cars, and other expensive equipment for keeping these levees, which are ever being undermined and destroyed when the river is in flood.

SILT DEPOSITS AGGRAVATE FLOOD DANGER

Reference has already been made to the fact that the Colorado deposits below Yuma yearly more than 100,000 acre-feet of silt. The flood danger from the river is greatly aggravated by this silt, for it was the silt deposit that built the deltaic ridge on which the river now flows, filled the old channel of the river, and later filled the channel toward Volcano Lake. Indeed, any depression which the river finds in which to flow is quickly filled with silt.

Estimates differ as to how long it will take the river to fill up the Pescadero depression, through which it is now flowing. Some say 8 years, some say 20 years. No one knows for a certainty. All that is known is that within a comparatively short time it will be filled.

The situation thus adverted to was excellently described by Mr. A. P. Davis, former Director of the Reclamation Service, as follows:

"In 1920 the situation became so critical that the district undertook at great expense to make a cut from the Bee River Channel to the Pescadero and succeeded in diverting the river into that channel, where it now flows. We now have the condition of relatively high land along the Bee Channel and the levee on the north, running westward to Volcano Lake. We have another ridge which the river followed for a long time and

built high, running nearly south, from Yuma to the Gulf of California. Between these is a triangular tract which is lower than either, traversed by the Pescadero in which the river is now flowing. It was testified here that it would take from 15 to 25 years to build up this delta as high as the Bee River ridge. No one can tell even approximately, but it may be assumed that this channel, like the Bee Channel, will begin to grow unstable in 10 or 12 years, though it may be possible to keep the river in its present vicinity considerably longer. It is certain, however, that the river will not fill every part of that triangle of low ground before it begins to give serious trouble.

"We know also that the river is now busy in its filling job and will continue it without cessation until it is completed. It will then become again as threatening as it was in 1921, when Imperial Valley was fighting for its life to keep it from overtopping Volcano Lake levee. As soon as we provide a large desilting reservoir, we will hold back the silt and the building process will be checked. If this is done at once, we take advantage of the low areas, and with the silting process checked the river channel will become relatively permanent, on low ground, with no tendency to leave it. Some sediment will come from the Gila, but it is certain that the building-up process will be made much slower, and the menace of the river regulated in flow will be removed to a distant date.

"If, on the contrary, the large desilting reservoir is postponed as some people propose, the silting will continue until this basin is filled, and the river again flowing on top of a ridge, ready to break loose with any

freshet, and threaten Imperial Valley as it did three years ago. It is clear that the desilting reservoir must be provided quickly, and it must be of large capacity, and must form a permanent lake in which all sediment will settle. (Hearings on H. R. 2903, 68th Cong., p. 1379.)"

No estimates have been made as to what the cost would be to dredge an artificial channel across the delta in Mexico after the Pescadero depression is filled. The cost would, of course, be enormous and doubtless beyond the resources of local communities. The work of so dredging and maintaining a channel would also be surrounded by almost insurmountable difficulties because of being in a foreign jurisdiction and when completed would be only another temporary expedient as the river would immediately start its work of filling it with silt.

DAM AT BOULDER CANYON WILL TAKE CARE OF SILT

Almost all of the silt now being discharged by the river is picked up through and above the canyon section and above Boulder Canyon. The proposed great reservoir there will provide ample capacity for intercepting and storing the silt. More than 300 years would be required to fill the entire reservoir, and this even without the construction of other dams above. In the meantime, of course, other developments will occur farther up the river which will intercept large portions of the silt discharge and thus prolong indefinitely the usefulness of this reservoir.

THE EFFECT OF FLOOD DANGER

The danger in which the Imperial Valley always stands of being flooded necessarily creates a feeling of uncertainty. Property values there were less than half of what the income from the property would justify. Money can be had only at excessive interest rates, while Federal farm-loan banks refuse to lend money on Imperial Valley farms.

From Report of Senate Committee on Irrigation and Reclamation, 1928, Senate Report No. 592, 70th Cong., 1st Sess., pp. 6, 7, 19, 20:

A menacing and destructive agency in its natural state, the Colorado River but awaits development and control, to be one of the great contributing factors to the wealth of the Nation and the happiness of the people of all of the territory of the Southwest. Successive administrations have recognized not only the possibilities of regulation and control of the Colorado River but the necessity for that regulation and control. From the time of President Roosevelt to that of President Coolidge, the Federal Government has recognized the problems of the Colorado River and the lands dependent upon it, and that these problems because of their country wide and international aspects were national in character and a matter of national concern. The present bill embodies the conceded solution of years of painstaking care and thorough study and investigation by the ablest engineers of our country. It seeks not only the control of one of the Nation's great rivers, but endeavors to remove the danger and the menace which, like a pall, has rested upon tens of thousands of American citizens, utilizes what is now waste water for

reclamation, irrigation, and domestic use, and ends the intolerable conditions now surrounding the Imperial Valley in its water supply.

The citizens in the Imperial Valley and the territory contiguous thereto have long been praying the Congress for relief from the perilous position in which the Colorado River in its erratic moods has placed them. Imperial County is the southeasterly county of the State of California. It borders upon Mexico. In its conformation physically it is different from any other part of our country and possibly different from any part of any other country in the world. The fertile valley which takes its name from that of the county is in shape like a saucer. Along the rim of a part of this saucer-shaped land flows the turbulent Colorado River. Beneath is the valley, 250 feet below the level of the sea. The rainfall is negligible. It is a natural desert composed of silt from the river that flows above it and which, during the ages, has reclaimed the sea, for the Imperial Valley at one time undoubtedly was a part of the Gulf of California, which gradually has been filled by this silt deposit of the Colorado River. * * *

Each season, because of the silt it carries, its bed rises higher. It is restrained and controlled by dykes and levees. The height of these levees has been constantly increased until to-day they are built to the danger point and can not be built higher.

Storage above and the regulation of the flow are now recognized as the only means of protection from floods, not only for the Imperial Valley but for a part of Arizona, a part which by reason of its development has become a productive, valuable, and beautiful territory. The flood danger, so far as

the Imperial Valley is concerned, is unlike that which exists in any other part of the United States. In other localities, destructive floods may occur with untold losses, and yet the waters subside and the territory affected ultimately recover. In the Imperial Valley floods mean water entering the basin of the saucer-shaped land with no possible outlet. Millions of dollars have already been expended, not only by the localities affected, but by the Federal Government, in the attempt to protect the lower basin of the Colorado River from floods. Levees at times have no sooner been built than they have been washed away. Here finally is presented a unified plan for protecting those entitled to protection, for the allocation among the States desiring that allocation of the waters of a great river to which all are entitled, for the elimination of intolerable conditions by which a fertile and productive part of the United States is dependent for its very life upon water which flows through Mexican territory, and finally for converting into a great national asset a wasteful and destructive agency, and by its control reclaiming for homes for Americans, land now arid and worthless.

The project contemplates the construction of a large dam and storage reservoir at Boulder or Black Canyon where the Colorado in its mad moments has prepared precipitous perpendicular granite or basalt walls more than 1,600 feet in height. In addition, an all-American canal for the protection of the lands of Imperial and Coachella Valleys is provided for. The dam will be approximately 550 feet in height and will create a water storage of 26,000,000 acre-feet.

And at the beginning and at the end of this report, it should be made plain that the entire project will finance itself; that the bill provides no work shall be undertaken and no money expended until the administration has provided for the adequate repayment of every penny that may be expended. The testimony demonstrates conclusively that the money for the work under this bill will be forthcoming, and that this tremendous enterprise, one of the greatest of our generation, fraught with such potential possibilities for good and with such incalculable benefit to our people, will cost the Federal Government nothing except loss of interest on reclamation features, the same as in all other works of this kind, and administrative effort. * * *

It should further be pointed out that, in addition to destroying crops and damaging lands, the Imperial Valley has the decided disadvantage of being below sea level and having no outlet for the water. Ordinarily, the flood waters from any stream finds its way back into the stream as the flood subsides. This is not the case in Imperial Valley. There the flood waters remain in the basin until taken out by the slow process of evaporation. * * *

Floods above Imperial Valley, were they not overshadowed by the exceptional flood danger to Imperial Valley, would attract attention and call for remedial measures. In 1916 the water stood 2 feet deep in the streets of the town of Yuma and threatened its destruction. In 1922 the river inundated a large part of Palo Verde Valley and the water stood several feet deep in the town of Ripley in that valley, destroying much property and otherwise causing a large amount of damage. Other floods have submerged

the Parker Valley and also done serious damage to the city of Needles.

The greatest flood danger, however, is to the Imperial Valley, lying far below the river's channel and with no outlet for flood waters once they enter the valley. * * *

An outstanding feature of the testimony before the committee was the unanimity of view respecting the existence of the flood danger, its seriousness, urgent need for quick action, and that storage up the river was the solution. Engineers like A. P. Davis, F. E. Weymouth, Gen. George Goethals, and William Mulholland joined with responsible executive officials like Mr. Herbert Hoover in voicing this idea. Admittedly and concededly, storage at Boulder Canyon as here authorized will effect the greatest measure of security against the river's floods which may be obtained.

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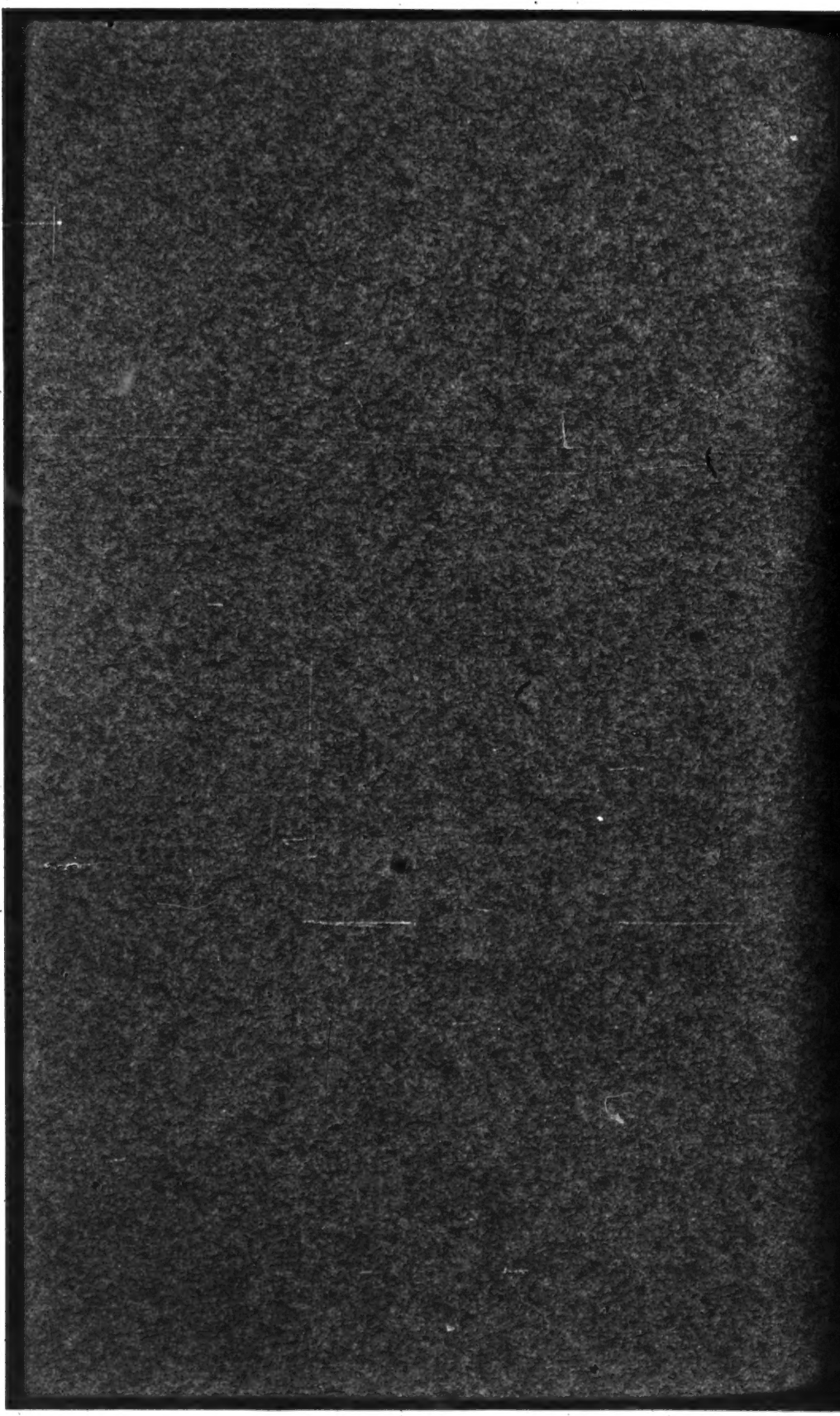

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MAR 9 1931

No. 19, Original

In the Supreme Court of the United States

OCTOBER TERM, 1930

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, STATE OF NEVADA, STATE OF UTAH, STATE OF NEW MEXICO, STATE OF COLORADO, STATE OF WYOMING, AND RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, DEFENDANTS

REPLY BRIEF BY RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, ON MOTION TO DISMISS THE BILL OF COMPLAINT

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 19, ORIGINAL

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, STATE OF NEVADA, STATE OF Utah, State of New Mexico, State of Colorado, State of Wyoming, and Ray Lyman Wilbur, Secretary of the Interior, defendants

---

REPLY BRIEF

In our original brief in support of the Defendant Wilbur's motion to dismiss the bill of complaint we contended that there are no allegations in the complaint that any existing or vested right has been invaded or is presently threatened (Point II, pp. 18–24) and that accordingly the bill of complaint presents only abstract questions which may never arise in any justiciable case or controversy. (Point III, pp. 24–26.)

In its brief Arizona concedes that at the present time the intervention of a court of equity is not necessary to protect the exercise and enjoyment of

rights of appropriators acquired prior to the effective date of the Act and Compact and that there is no allegation that these rights are threatened. (Arizona brief, p. 17.) Attempt is then made to support the bill as follows:

> 2. The bill alleges the threat of immediately impending injury to Arizona and its people from acts of defendant Wilbur and presents a case to which the judicial power extends. (Arizona brief, p. 26.)
>
> (a) Defendant Wilbur threatens to invade the quasi-sovereign rights of Arizona by building a dam within its jurisdicton and diverting and using water from its jurisdiction in violation of its laws. (Arizona brief, p. 27.)
>
> (b) Defendant Wilbur also threatens to prevent any use in Arizona of unappropriated Colorado River water now flowing there, and, at the same time, to deliver such water for use in other States under contracts, adverse to Arizona, for permanent service. (Arizona brief, p. 31.)

The statement (a) is insufficient to support the bill unless some interference with personal or property rights is also alleged. We have shown in our main brief that no such interference is adequately alleged. The statement (b) is not supported by allegation except by reference to the Boulder Canyon Project Act, the Regulations and the Water Contract which have reference only to "stored water" and such diversions are not shown to be in derogation of the personal or property rights of others.

Throughout its brief Arizona, while insisting that it is not bound by the Compact, complains that the defendants are imposing the terms of the Compact upon it. All of the defendants have in their briefs disclaimed any such right. What the defendant States have done is to limit their appropriations as the Compact provides and Congress has declared that withdrawals from the reservoir shall not be in violation of this agreement. Arizona having chosen to be free of the Compact may continue to make appropriations from the Colorado where rightful access may be had to the stream. The allegations that her citizens are being prevented from making such appropriations have been discussed in our main brief and we submit are insufficient.

We do not dispute the quasi sovereign right of a State to the protection of a court of equity against injury actual or threatened to property or persons within its borders; but it is entirely clear from the decisions of this Court that in the absence of any such injury there is no jurisdiction in equity to grant relief. In all such cases there must be actual or threatened injury to some proprietary right of the State or to some personal or property rights of its inhabitants. The cases cited by Arizona clearly illustrate this prerequisite of equitable jurisdiction even when the suit is brought by a State in its quasi sovereign capacity.

Thus in *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, the suit was brought to enjoin defendant

from discharging from its works in Tennessee noxious gases which were causing wholesale destruction of forests, orchards, and crops and other injuries done and threatened in five counties in Georgia. In *Kansas* v. *Colorado*, 185 U. S. 125, the gravamen of the bill was that Colorado was depriving and threatening to deprive Kansas and its inhabitants of all the water in the Arkansas Valley to the injury of the State as an individual riparian owner and of all the inhabitants of the State and particularly those in the Arkansas Valley. The bill was sustained on demurrer because these allegations disclosed threats of serious injury to property rights. On final hearing the bill was dismissed not withstanding perceptible property damage. (*S. C.*, 206 U. S. 46, 117.) The complaint at bar fails to allege any such damage done or threatened. It proceeds upon the untenable theory that there has been an invasion of sovereignty without injury to property or person.

In *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, a private riparian owner unsuccessfully challenged the validity of a State statute which forbade the transportation of fresh water from lakes, ponds, and streams within the State through pipes into any other State for use therein. The decision furnishes no support for the plaintiff's bill of complaint.

In *Missouri* v. *Holland*, 252 U. S. 416, suit was brought in the District Court to enjoin a United

States game warden from enforcing the Migratory Bird Treaty Act and regulations thereunder. The State alleged a pecuniary interest as owner of wild birds within its borders and this allegation was admitted by the Government to be sufficient basis for equitable relief if the statute was unconstitutional. The validity of the statute was upheld both in the District Court and in this Court where it was said that there was proper assertion of the alleged quasi sovereign rights of the State. This was obvious because the game warden in enforcing the law was threatening to prevent the exercise of personal rights of the inhabitants of the State in lawfully killing game.

In *Trenton* v. *New Jersey*, 262 U. S. 182, the State sued the city in its own courts to recover a charge imposed by statute upon the diversion of waters from the Delaware River. The city claimed a property right which could not be impaired by statute. It was held that the defense could not be sustained because the city was an instrumentality of the State. Obviously this case furnishes no support for plaintiff's bill.

In *New York* v. *New Jersey*, 256 U. S. 296, an original suit to enjoin New Jersey from discharging sewage in the Upper Bay of New York Harbor, it was expressly alleged that pollution would amount to a public nuisance, which would result in grave injury to the health, property and commer-

cial welfare of the people of the State and City of New York. This court said (pp. 301, 302):

> The health, comfort and prosperity of the people of the State and the value of their property being gravely menaced, as it is averred that they are by the proposed action of the defendants, the State is the proper party to represent and defend such rights by resort to the remedy of an original suit in this court under the provisions of the Constitution of the United States. *Missouri* v. *Illinois*, 180 U. S., 208, 241, 243; *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230.

But the bill was dismissed without prejudice because the complainants had not shown by convincing evidence that a public nuisance would result from the acts of the defendant.

In *Colorado* v. *Toll*, 268 U. S. 228, suit was brought in the District Court by Colorado against the Superintendent of Rocky Mountain National Park to enjoin him from carrying out certain park regulations, particularly with regard to automobile traffic, which were alleged to be unauthorized by Congress. The bill was dismissed on the merits in the District Court. In this Court it was sustained as properly brought. Upon the allegations of the bill it appeared that the defendant was without right interfering or threatening to interfere with the use of the highways by persons who were entitled to use them all in derogation of the sovereignty of the State.

In *Wyoming* v. *Colorado*, 259 U. S. 419, it was alleged that Colorado was diverting water from

the Laramie River to another watershed to the injury of prior appropriators in Wyoming. In meeting the contention that prior appropriators of water from the stream in Wyoming must be served, Colorado broadly contended, as Arizona does in this suit, that she had an absolute right to control all the waters in her territory because her rights were sovereign and superior to the rights of appropriators in either State. The Court declined to recognize any such right in Colorado and measured the rights of the two States in accordance with the appropriations made by their citizens, concluding that the doctrine of appropriation "furnishes the only basis which is consonant with the principles of right and equity applicable to such a controversy as this." This is a controlling decision in its application to the case at bar and yet Arizona complains of no diversion actual or threatened which will invade any right predicated upon appropriation which has been or is planned or proposed to be made. *Kansas* v. *Colorado, supra,* and *Wyoming* v. *Colorado, supra,* clearly show that where there has been no damage to water rights perfected by appropriation there can be no relief.

In *Marshall Dental Co.* v. *Iowa,* 226 U. S. 460, this Court affirmed a decree of the Supreme Court of the State of Iowa enjoining an intruder without title to the bed of a fresh water lake from draining the lake. The right of the State to maintain the suit, whether it owned the bed of the lake or not,

was sustained. Property damage done or threatened was obviously involved in this suit.

The authorities cited by Arizona show the necessity of allegation and proof of injury actual or threatened to sustain its bill. That the mere diversion of water without its permission in the absence of allegation that any person will be deprived of its use is no cause of suit is entirely clear. *New York* v. *Illinois*, 274 U. S. 488; *New Jersey* v. *Sargent*, 269 U. S. 328; *Connecticut* v. *Massachusetts* (No. 12 Original Oct. Term 1930, decided February 24, 1931). See also *Georgia* v. *Stanton*, 6 Wall. 50; *Florida* v. *Mellon*, 273 U. S. 12; *Massachusetts* v. *Mellon*, 262 U. S. 447.

What was said in *New Jersey* v. *Sargent*, *supra* (p. 337) of vague allegations of projects for future use of water and what was said in *Georgia* v. *Stanton* (pp 76–77) of a prayer for relief merely declaratory of the unconstitutionality of a Federal statute are pertinent comments upon the insufficiency of the bill in this case. The determination of this Court in *Connecticut* v. *Massachusetts*, *supra*, that no injury to the King's Island power development was shown demonstrates the lack of allegation of any injury essential to the maintenance of this suit in Arizona's bill of complaint.

Our position, we submit, is strengthened by Arizona's concession of lack of injury to persons or property. The complainant's brief shows the case to be a naked assertion that the defendant Wil-

bur is proposing to divert water from the Colorado, which no person even proposes to use for any beneficial purpose. The bill, we submit, should be dismissed.

Respectfully submitted.

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ROBERT P. REEDER,
Attorney.

MARCH, 1931.

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CHARLES ELMORE CROPLEY
CLERK

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REPLY BRIEF AND ARGUMENT

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REPLY BRIEF AND ARGUMENT

(All italics are ours.)

(All references to "our former brief" refer to the brief of Colorado, New Mexico and Nevada.)

STATEMENT OF FACTS.

For the purpose of clarifying the argument to be made in reply to Arizona's brief, attention is called

to the following facts which have a material bearing upon all that is said or to be said by either ourselves or opposing counsel in respect to the issues raised by the bill of complaint and the motion to dismiss filed herein by the defendant States.

This is an Equity suit in which seven states of the United States of America and the head official of a subordinate department of the Executive Department of the United States government are parties.

The suit is bottomed upon the theory that a case of controversy exists between the State of Arizona, as Complainant, and the six other States, and the Secretary of the Interior, as the official head of the Department of the Interior, as Defendants, over which this honorable Court is authorized to assume jurisdiction by virtue of the constitutional provision which confers original jurisdiction upon it of suits between states and between states and the citizens of other states.

The Defendant States have filed a motion to dismiss the Bill.

The purpose of the complaint is to test the constitutionality of an Act of Congress and a six-State compact into which the defendant States have entered, with the consent of Congress, and the constitutionality of which Arizona seeks indirectly to have adjudicated by her effort, in this suit, to secure an injunction restraining the execution by said Secretary of said Act, which was passed by the Congress in the exercise of its governmental, legislative power.

July 3, 1930 "Congress appropriated the sum of $10,600,000.00 for the commencement of said Dam and incidental works," (Bill, page 23, par. XX.); and the Bill specifically alleges that said executive official has

"pursuant to and under color of said Act, seized and taken possession of all that part of the Colorado River which flows in Arizona and on the boundary thereof, and of all water flowing in said River * * * and of all dam sites and reservoir sites mentioned in paragraph X hereof, and now has said River and said water and said sites in his possession; has excluded and is now excluding the State of Arizona, its citizens, its inhabitants and property owners from said river, said water and said sites and from all access thereto," (Bill, pp. 32-33, par. XXX). That, "pursuant to and under color of said Act", said executive official has made surveys, plans and specifications for, and has commenced the construction of the dam, reservoir, power plant and other works provided for in said Act. That, "pursuant to and under color of said Act", said official has made and prescribed general regulations respecting contracts for the storage of water in said reservoir and for the delivery of water thereof for irrigation and domestic use, (Bill, pp. 33-34 par. XXXI), and that, "pursuant to and under color of said Act", he is otherwise carrying out the provisions thereof as shown in paragraphs XXXII and XXXIII on pages 34, 35 and 36 of the Bill.

The Congressional Act of which complaint is made clearly confers upon said executive official, general power and authority for the exercise of official discretion and judgment in executing its provisions. He is not only expressly empowered and authorized to exercise such discretion and judgment in selecting the site for the dam which the act authorizes him to construct and maintain and which site he has selected.

(Bill, par. I, page 59; page 80, sec. (3)); but, throughout the act, provisions are made, in minute detail, for the exercise of such discretion and judgment in his execution of said act.

It expressly appears on the face of the bill that in sec. I of the act of which complaint is made, congress has declared its purpose to be the improvement of navigation, etc. (Bill, page 58); and that in sec. 6 thereof it is expressly provided:

> "That the dam and reservoir provided for by sec. I hereof shall be used; first, for river regulation, improvement of navigation and flood control; second, for irrigation and domestic uses and satisfaction of present and perfected rights in pursuance of Article VIII of said Colorado River Compact, and, third, for power." (Bill, page 68.)

The ultimate general purpose and object sought to be accomplished by the bill is clearly shown by the prayer for relief, pages 39 and 40, and the specific ground of attack upon the constitutionality of the act in question, is shown in par. XXVIII, pp. 29, 30 and 31, as shown in our former brief.

The brief of complainant concedes, by failure to deny, our statement of the gravamen of the bill made on page 11 of our former brief, which is as follows:

> "The gravamen of the bill is that the Boulder Canyon Project Act is unconstitutional and void in that it:
>
> 'Is in excess of the powers granted to Congress by the Constitution of the United States' (Bill, p. 29), and that, its effect, if carried into execution by the Secretary of the Interior, will result in an invasion of Arizona's sovereign jurisdiction

and right to control the water and other natural resources of said State; of its right and those of its citizens, inhabitants and other property owners to appropriate and use said water and other natural resources, and of its sovereign authority and right to levy and collect taxes upon businesses and property used in connection therewith which, but for the operation of the Act, would be developed and result in 'great increase in population, wealth, prosperity and taxable resources of said State.'

"These allegations constitute the sum total of the allegations contained in the Bill upon which the complainant relies for the statement of a cause of action for equitable relief against the enforcement of the Boulder Canyon Project Act, and are epitomized and specified with particularity in par. XXVIII, pp. 29, 30 and 31 and par. XXXVI, pp. 38 and 39, which, read in connection with the prayer for relief at pages 39 and 40 of the Bill, clearly identify the kind of cause for relief in equity against the enforcement of the act upon which complainant has placed its whole reliance."

Instead of denying the foregoing statement, opposing counsel, while denying that the rights so alleged in their bill of complaint are political rights, confirm that statement in the most emphatic manner as follows:

On page 9 of their brief they say:

"It is a suit to enjoin an officer of the United States from executing and enforcing an unconstitutional enactment, which, if executed and enforced, will deprive the State of Arizona of its rights as a quasi sovereign State to regulate and control an appropriation and use of water within the State and of its right as a land owner to

appropriate such water for use on its own land, and will deprive other land owners in Arizona of their right to make similar appropriations and will thereby cause great and irreparable injury to the state and its inhabitants," (Bill, 20140).

On pages 21-22 they say:

"Recognizing the vital importance to the welfare and prosperity of the state of the waters within its boundaries, Arizona has exercised its *sovereign authority* over them by statutes which control the building of dams and the use and appropriation of water and forbid any of these acts without its consent. * * *

The object of the Bill is to restrain an individual from doing acts which it is alleged he has no authority to do, and which derogates from the sovereign authority of Arizona over water flowing within her boundaries, (Bill, 13-14)."

On page 23 they say:

"What has been said above shows clearly that the rights here asserted by Arizona are not political rights beyond cognizance of this Court, as is asserted by Colorado, Nevada and New Mexico."

Thus Arizona's own brief shows that the theory upon which she enters Court is not that the Boulder Canyon Project Act does not purport to confer authority upon the secretary to do the things the Bill alleges he is doing and intending to do, but that, because it does purport to so authorize him, the Act is unconstitutional and, for that reason, his actions are illegal—not because he is *exceeding*, by acting beyond, the authority so attempted to be conferred upon him,

but because the Congress, in its effort to confer such authority, has exceeded *its* constitutional authority, and, for that reason the Act is void. So, by Arizona's own statements it affirmatively appears that the object of the Bill is to secure a decision upon an abstract question in respect of the constitutionality of the Act, and not to enjoin an official who is acting beyond the scope of the authority which Congress has conferred upon him.

The gravamen of the Bill of Complaint is therefore apparent, and the question we have raised in respect of the jurisdiction of the Court over its subject matter is narrowed down to a contention on our part that the Bill seeks a decision upon an abstract question and that the rights which the complainant seeks to have protected by injunction against alleged, threatened injury, are political rights of which the courts cannot take judicial cognizance in an equity suit for the control of the legislative and executive departments of the United States Government; while opposing counsel assert that the object of the Bill is to secure the protection of quasi-Sovereign rights, of the same nature as those involved in, and justiciable for the same reasons that this Court entertained jurisdiction in such cases as Kansas v. Colorado, 206 U. S. 97; Georgia v. Tennessee Copper Co., 206 U. S. 230, and other like cases which will receive our attention as we proceed.

From the foregoing, we submit that, it is plain that the whole argument of opposing counsel upon this subject is based upon the major premise that Arizona is vested with "*Sovereign authority*" or "Sovereign jurisdiction and control of all water within its boundaries, including the water of the Colorado River and

its tributaries," as they, themselves, have stated in their brief on pages 21-22, as follows:

> "Recognizing the vital importance to the welfare and prosperity of the state of the waters within its boundaries, Arizona has exercised its *Sovereign authority* over them by *statutes* which *control* the building of dams and use and appropriation of water and forbid any of these acts without its consent," (Bill, 13-14), (Arizona's Brief pp. 21-22).

From the fact that she has so exercised her authority, as their premise from which to reason, opposing counsel have deduced the conclusion that the *effect* of the Boulder Canyon Project Act, if executed, will be an invasion of the State's Sovereign authority, jurisdiction and control of said water and other natural resources, and of the rights of the State, its inhabitants and property owners, which are dependent for existence upon, and incidential to that Sovereign authority, jurisdiction and control, and that the execution of the Act is illegal, because it "exceeds the powers granted to Congress by the Constitution and is unconstitutional and void," (Bill, 29), instead of being an illegal attempt on the part of the *Secretary* to exceed the authority conferred upon *him* by the Boulder Canyon Project *Act*.

But whether such Sovereign authority or jurisdiction and control is vested in that state, or in the Congress of the United States, we submit, clearly turns upon the determination, in the first instance, of a question of *fact* whether or not the river in controversy is a navigable or non-navigable stream, so that the question in respect of jurisdiction over the

subject matter of the Bill, which we have raised, depends upon the solution of a question of alleged *conflict* of sovereign authority or political jurisdiction to control the waters of said river as between Arizona and the Congress of the United States; and the existence of such sovereign authority, jurisdiction or control in either the one or the other of them depends upon the determination of whether the river is a navigable or a non-navigable stream.

PRELIMINARY OBSERVATIONS CONCERNING THE GOVERNING PRINCIPLES WHICH ENTER INTO THE CONSIDERATION OF THE MOTION TO DISMISS.

The United States of America is an entity which has been and now is endowed with the sovereign powers of a government "of the people, by the people and for the people", of the states of which it is composed.

While for some purposes "the people" are citizens of said states; for others, they are citizens of the United States, (Massachusetts vs. Mellon, 262 U. S. 447), and they are, in respect of the governments of either, supreme over each in their respective spheres of action. (Van Brocklin vs. Tennessee, 117, U. S. 151.

Each of said governments is composed of coordinate departments of government, and each of said departments within *its* appropriate sphere of action, is respectively, the *supreme representative* of, and responsible to, none save "the people" from whom *its* powers are derived, save and except only as it may be limited by the constitution under which its powers

are exercised, (Mississippi vs. Johnson, 4 Wall. 475, 71 U. S. 475; Georgia vs. Stanton, 6 Wall. 50).

Therefore, since, under our system of government, each of said governments is limited by constitutional provisions to action only through the agency of coordinate departments of government, and said departments are limited to action only through the agency of official heads of departments and subordinate departments, it not only follows, as a necessary consequence, that said respective governments and departments of government are responsible only to "the people" of whom they are composed, (except only as they are limited by their constitutions; but, likewise said official agents, in their exercise of governmental power or political jurisdiction, are responsible to none save "the people" for their compliance or lack of compliance with constitutional provisions under which their authority is exercised unless said constitution specifically places limitations upon the exercise of such authority by them). (Mississippi vs. Johnson, *supra;* Wisconsin vs. Duluth, 96 U. S. 379.) Therefore, the actions of such official representatives when so acting, instead of being their own actions, are, in effect, the acts of the government which they represent, (Louisiana vs. McAdoo, 234 U. S. 627).

Such being the facts and the governing principles which, we respectfully submit, are applicable thereto, it follows that, from every viewpoint, the Bill of Complaint is fatally defective.

We, therefore submit, in support of the proposition stated in our motion to dismiss and in reply to Arizona's brief, the following:

ARGUMENT.

The Bill of Complaint Does Not Present for Adjudication Any Case or Controversy of Which the Court Can Take Judicial Cognizance.

In keeping with our anticipations and in fulfillment of our expectations when our first brief was filed, in her answer, Arizona has attempted to shield her Bill of Complaint under the cover of such cases as Kansas vs. Colorado, 206 U. S. 46; Georgia vs. Tennessee Copper Co., 206 U. S. 230 and other like cases. But each and every of such cases were brought by quasi-sovereign States, suing in that capacity, for the protection of alleged quasi-sovereign state rights or interests which were *not* renounced by the states when they yielded to the Federal Government all authority to make war, enter into treaties and regulate commerce; but which under the Tenth Amendment to the Federal Constitution were "reserved to the states respectively or to the people"; and in each and every of said cases the Bill of Complaint conforms strictly to the clearly defined rule stated by this honorable Court in Florida vs. Mellon, 273 U. S. 12, at p. 16, wherein it is said:

> "While judicial relief sometimes may be granted to the quasi-sovereign state under circumstances which would not justify relief if a suit were between private parties, Georgia vs. Tennessee Copper Co., 206 U. S. 230-237, nevertheless, it must appear that the State has suffered a *wrong* furnishing a ground for *judicial* redress, or is asserting a right susceptible of *judicial* enforcement. The mere fact that the State is a Plaintiff is not enough."

What then are the rights of the states, as such, which are susceptible of judicial enforcement in this Court? We submit that they are such only as were reserved to the states by the Tenth Amendment and that no other than such rights were involved in the suits wherein jurisdiction was entertained by this honorable Court over such cases as Kansas vs. Colorado, and other like cases that are cited and relied upon in complainant's brief.

We further submit, that in each and every of said cases such quasi-sovereign States rights were alleged to have been invaded either by sister states or by individuals or corporations, and that none of them were made to depend upon a mere alleged conflict of authority between a State and the United States, as in the instant case.

We submit that this suit clearly is one between a quasi-sovereign State and a representative of the executive department of the Sovereign Government of the United States which involves an attack upon the constitutionality of an act, wherein the Congress of the United States has asserted sovereign, political jurisdiction and authority over a particular river for the declared purpose of improving its navigation, and which was enacted in the exercise of a purely legislative, governmental, political power which the states surrendered to Congress by the commerce clause of the Federal Constitution, for that purpose.

The only ground of attack upon the constitutional validity of this act is alleged without any uncertainty, as shown on page 11 of our former brief, and is confined to an allegation that said Act is in *excess* of the *powers granted* to *Congress*, (not the Secretary of the Interior), by the Constitution of the United States,

for the particular reasons specified on pp. 29, 30 and 31 of the Bill of Complaint. As also shown in our former brief, pp. 21 and 22, the Bill of Complaint nowhere attempts "to question the constitutionality of the *Act* upon the ground that, notwithstanding the unquestioned power of Congress to improve navigation, it *abused* that power by assuming to enact the Boulder Canyon Project Act for the declared purpose of improving the navigability of the Colorado River, when, in fact, 'it is not now and has never been a navigable river.'"

No attack whatever is contained in the bill of complaint against either the constitutionality of the act or the actions of the Secretary of the Interior in enforcing it, on the ground of any arbitrary abuse of any power, either legislative, executive, political or judicial, by either the Congress of the United States in enacting the statute, or by the Secretary of the Interior, representing the executive department of the Government, in executing it. Therefore, we submit that the distinction between such cases as the instant case and those cited and relied upon in complainant's brief is perfectly apparent, and clearly due to the fact that the rights reserved to the States by the Tenth Amendment are the only quasi-sovereign rights possessed by the States that are susceptible of judicial enforcement by original action in this court; while the right or power which Congress exercised in the enactment of the Boulder Canyon Project Act, and which is being executed by the representative of the executive department of the Government, is a sovereign right or power which *was yielded* to Congress by the Interstate Commerce clause of the Federal Constitution, and one which

has never been the subject for even a colorable issue since the decision of Gibbons vs. Ogden, 9 Wheat. 1. This decision was based upon the ground that acts of the legislature of a State, purporting to grant exclusive rights to navigate waters within the jurisdiction of the State of New York, were repugnant to that clause of the Constitution of the United States which authorizes Congress to regulate commerce.

Clearly the States were absolute sovereigns from the time of the closing of the Revolution until the adoption of the Federal Constitution, and, during that time, had absolute sovereign, political jurisdiction and control over navigable waters, within their boundaries; but by the Constitution they yielded that sovereign authority over navigable waters to the Congress of the United States. From that time the United States Government became the *owner* thereof, for the purpose of controlling navigation and thereby vested with the same sovereign, political jurisdiction and control thereover, as was possessed by the States themselves prior to the adoption of the Constitution.

In an early discussion of this subject, this honorable court, in South Carolina vs. Georgia, et al., 93 U. S. 4, at pp. 9-10, said:

> "Whatever, therefore, may have been their rights in the navigation of the Savannah River before they entered the Union, either as *between* themselves or *against others*, they both agreed that Congress might thereafter do everything *which is within the power* thus delegated. That the power to regulate inter-State commerce, and commerce with foreign nations, conferred upon Congress by the Constitution, extends to the control of navigable rivers between States,—rivers that are accessible from other States, at

least to the extent of improving their navigability,—has not been questioned during the argument, nor could it be with any show of reason. From an early period in the history of the Government, it has been so understood and determined. *Prior to the adoption of the Federal Constitution, the States of South Carolina and Georgia together had complete dominion over the navigation of the Savannah River. By mutual agreement they might have regulated it as they pleased.* It was in their power to prescribe, not merely on what conditions commerce might be conducted upon the stream, but also how the river might be navigated, and *whether it might be navigated at all.* They could have determined that all vessels passing up and down the stream should pursue a defined course, and that they should pass along one channel rather than another, where there were two. They had *plenary* authority to make improvements in the bed of the river, to divert the water from one channel to another, and to plant obstructions therein at their will. This will not be denied; but the power to 'regulate commerce', conferred by the Constitution upon Congress, *is that which previously existed in the States.* As was said in Gilman vs. Philadelphia, 3 Wall. 724, 'Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable rivers of the United States which are accessible from a State other than those in which they lie. For this *purpose* they are the *public property* of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep these open and free from any obstruction to their navigation interposed by the States, or otherwise; to remove such obstructions where they exist; and to provide, by such sanctions as they may deem proper,

against the occurrence of the evil and for the punishment of the offenders. For *these purposes* Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England.' Such has uniformly been the construction given to that clause of the Constitution which confers upon Congress the power to regulate commerce."

In all such cases, therefore, the only possible ground of conflict as between the States and the United States or its legislative and executive departments, is one which involves a purely political right, power or authority. In every such case the only right, power or authority that can be a subject in dispute is bound to be one in respect of the political right, power or authority of the Congress to govern and control, in the *exercise* of its *legislative judgment*, waters within the States of the United States. The only possible test for the determination of the right to exercise that right, power or authority in any particular case, necessarily consists in the exercise of legislative judgment of Congress upon the question whether, in a given case, a particular stream or body of water over which such control is to be or not to be asserted is or is not a navigable stream or body of water; or whether, if a non-navigable stream, property rights therein must be acquired as a prerequisite to the improvement intended. But as we shall attempt to show as we proceed, the Congress has complete jurisdiction and sovereign authority under the commerce clause to improve either navigable or non-navigable streams for the purposes of navigation, and that the only difference in its authority in such cases, respectively, is that in the one

case the power is unlimited, while in the other, it is limited by other provisions of the Constitution, and that, as a consequence, Congress may authorize the improvement of either kind of such streams, and that the only conditions with which it has to comply even in case of non-navigable streams are the constitutional limitations which guard and secure rights non-political.

The result is that in the exercise of, and as a necessary incident to, its exercise of this sovereign power, Congress must, in order to execute it at all, possess the power, jurisdiction and authority to determine and declare what waters are navigable waters over which it may, and, the manner in which it will, assume such jurisdiction and control.

In 45 C. J. 433-434 it is said:

> "Congress has power, which is paramount to that of the states, to make improvements in the navigable streams of the United States, and for this purpose *to determine* and *declare what waters are navigable.*"

And in Wisconsin vs. Duluth, 96 U. S. 379, it is said:

> "We do not feel called upon to make an argument to prove that these statutes of the Congress of the United States, and these Acts of the Executive Department in carrying those statutes into effect, constitute an adoption of the canal and harbor improvement started by the City of Duluth, and a taking of exclusive charge and control of it. That they amount to the *declaration* of the Federal Government, that we here interpose and assert our power; *we take upon ourselves the burden of this improvement, which properly belongs to us,* and that hereafter this

> work for the public good is in our hands and subject to our control. * * *
>
> "Nor can there be any doubt that such action is within the constitutional power of government."

Since, therefore, the Congress of the United States is a *political* department of that government and is authorized to determine and declare what waters are navigable, preliminary to an assertion of authority over them for the improvement of navigation, it follows as a necessary conclusion that, in so doing, it can only act by legislative determination and declaration, which always involves the exercise of judgment and discretion. Therefore, the power or jurisdiction so to determine and declare are purely political and not judicial; consequently, this power being a political power, and the members of Congress who exercise it, being the immediate and direct representatives of "the people", to whom alone they are answerable, their action in this respect is final and conclusive as against any action of the judicial department of the government, and, for that reason, this honorable Court has no jurisdiction over the subject matter of the Bill of Complaint in the instant case, (Mississippi vs. Johnson, *supra;* Wisconsin vs. Duluth, *supra,* and authorities cited in our first brief).

1. The Bill of Complaint Presents Nothing for Consideration Save an Alleged Conflict of Authority Between Arizona and the United States with Respect to the Colorado River.

The general statutes of Arizona to which reference is had in the Bill of Complaint, all relate to the con-

trol of the appropriation and use of the waters of the State in general and make no provision concerning the control or use of navigable waters either in general or in particular. On the contrary, the Boulder Canyon Project Act legislates with reference to the improvement of the navigation of a particular river, and the Act itself declares the purpose of Congress in its enactment to be the improvement of navigation.

While these respective statutes relate to subjects that are wholly distinct from each other, nevertheless the sovereign authority, jurisdiction, right or power exercised in each instance is clearly legislative, political and governmental.

Again, this conclusion would seem to be to apparent to require the citation of authority, but as against any possible contention to the contrary, we call attention to the following:

> Political power consists in: "the policy of government or its administration. Also, power exercised by a political department of a government;" and

Political rights are:

> "Those which may be exercised in the formation or administration of the government; the power to participate, directly or indirectly, in the establishment or management of the government; those rights which belong to a nation, or to a citizen, or to an individual member of a nation, so distinguished from civil rights, namely, local rights, of a citizen."
> 49 C. J. 1076-1077.

Then what are the nature of the rights claimed by Arizona on the basis of the alleged invalidity of the Boulder Canyon Project Act which it alleges would be infringed by its execution? Quoting the exact words of the complainant's brief and bill of complaint, we find the following:

On pages 21-22 of the brief it is said:

> "Recognizing the vital importance to the welfare and prosperity of the State of the waters within its boundaries, Arizona has exercised its *sovereign authority* over them by statutes which control the building of dams and the use and appropriation of water and forbid any of these acts without its consent (Bill, 13-14)."
>
> "The object of the bill is to restrain an *individual* from doing acts which it is alleged he has no authority to do, and which derogate from the *sovereign authority* of Arizona over water flowing within her boundaries."

And on page 31 in the bill of complaint it is alleged that:

> "Said act attempts to authorize the Secretary of the Interior on behalf of the United States * * * to deprive said State of its right to levy and collect taxes on * * * businesses and on property used in connection therewith."

We submit that each and every right so claimed is clearly political.

> "The use of water, especially for the irrigation and reclamation of land, is a public use in which the general public is interested. The State control of such uses is an exercise of police power." 3 Kinney on Irrigation, pp. 24-28, Sec. 1341, and cases cited.

Hoge vs. Eaton, 135 Fed. 411; 141 Fed. 64.
Henry vs. Roberts, 50 Fed. 902, 904.

"Police power is but another name for the power of government; it is subject only to constitutional limitations which allow a comprehensive range of *judgment*, and it is the province of the State to adopt by its legislature such policy as it deems best." (Syllabus.)
Mutual Loan Company vs. Martell, 222 U. S. 225.

The right or power to appropriate water under the authority of such legislation is *publici juris*, and political in its nature to the extent that one who, under such legislation, has been authorized to make such an appropriation may even exercise the power of eminent domain for the enforcement of such a right.

Clark vs. Nash, 198 U. S. 361.

So also is the right or power of a quasi-sovereign State to exercise dominion over the beds and waters of navigable streams, (in the absence of the exercise of the superior power of Congress), a power of government which is purely political.

"The soil under navigable waters being held by the people of the State in trust for the common use and as a portion of their inherent sovereignty, any act of legislation concerning their use effects the public welfare. It is therefore appropriately within the exercise of the police power of the State."
Illinois Central Railroad vs. Illinois, 146 U. S. 387, 459.
Gray vs. Reclamation District, 174 California, 622; 163 Pac. 1024.

On the other hand, the power of the United States Government to legislate for the benefit of navigation necessarily involves the exercise of governmental, political power.

Jackson vs. United States, 230 U. S. 1, page 23.
United States vs. Chandler-Dunbar Water Power Co., 229 U. S. 53, 64.
Louis Bluepoint Company vs. Briggs, 229 U. S. 87-88.

We, therefore, submit that the bill of complaint in this case alleges no injury or threatened injury to any right whatever that is not a pure political right which is impossible of direct injury. It, therefore, in no sense conforms to the rule stated by Mr. Justice Sutherland in Florida vs. Mellon, supra, wherein it is said:

> "While judicial relief sometimes may be granted to a quasi-sovereign State under circumstances which would not justify relief if the suit were between private parties * * * nevertheless, it must appear that the State has suffered a *wrong* furnishing ground for *judicial* redress, or is asserting a *right* susceptible of *judicial* enforcement. The mere fact that a State is the plaintiff is not enough."

On the contrary, it presents for determination nothing save a question of *alleged conflict* of *authority* based upon a claim of alleged political rights for the exercise of political control over the Colorado River as between the Government of the United States and the Government of the State of Arizona.

But the authority and jurisdiction of each in re-

spect of such a river is wholly distinct and different from that of the other, and in each case depends for assertion upon the exercise of legislative judgment and discretion. And as between the two, the authority of Congress comes to it by way of constitutional grant and is the superior, plenary power or right which, when asserted by a legislative act, constitutes a supreme law of the land, anything in the Constitution or laws of the State to the contrary notwithstanding. As said by this honorable court in Union Bridge Company vs. United States, 204 U. S. 364, page 392:

> "All the causes concur in holding that the power of congress to regulate commerce and therefore navigation, is paramount and is unrestricted except by the limitations upon this authority by the Constitution. Of course, every part of the Constitution is as binding upon congress as upon the people. The guarantees prescribed by it for the security of private property must be respected by all. But whether navigation by waters over which congress may exert its authority requires improvement at all, or improvement in a particular way, are matters *wholly within its discretion;* and the judiciary is without power to control or defeat the will of congress so long as that branch of the Government does not transcend the limits established by the supreme law of the land."

In United States vs. Chandler-Dunbar Co., 229 U. S. 53, at pages 64-66, it is said:

> "So unfettered is this control of Congress over the navigable streams of the country that its judgment as to whether a construction in or over such a river is or is not an obstacle and a

hindrance to navigation, is conclusive. Such judgment and determination is the exercise of legislative power in respect of a subject wholly within its control.

"In Pennsylvania vs. Wheeling Bridge Company, 18 How. 421, 430, this court, upon the facts in evidence, held that a bridge over the Ohio River, constructed under an act of the State of Virginia, created an obstruction to navigation, and was a nuisance which should be removed. Before the decree was executed Congress declared the bridge a lawful structure and not an obstruction. This court thereupon refused to issue a mandate for carrying into effect its own decree, saying:

"'Although it still may be an obstruction in fact, it is not so in the contemplation of law. We have already said, and the principle is undoubted, that the act of the legislature of Virginia conferred full authority to erect and maintin the bridge, subject to the exercise of the power of Congress to regulate the navigation of the river. That body having in the exercise of this power, regulated the navigation consistent with its preservation and continuation, the authority to maintain it would seem to be complete. That authority combines the concurrent powers of both governments, State and Federal, which, if not sufficient, certainly none can be found in our system of government.'

"In Philadelphia vs. Stimson, supra, and in Union Bridge Company vs. United States, 204 U. S. 364, many of the cases are cited and reviewed and we need add nothing more to the discussion.

"The conclusion to be drawn is, that the question of whether the proper regulation of navigation of this river at the place in question required that no construction of any kind should be placed or continued in the river by

riparian owners, and whether the whole flow of the stream should be conserved for the use and safety of navigation, are questions legislative in character; and when Congress determined, as it did by the act of March 3, 1909, that the whole river between the American bank and the international line, as well as all of the upland north of the present ship canal, throughout its entire length, was 'necessary for the purposes of navigation of said waters and the waters connected therewith,' that determination was *conclusive*.

"So much of the zone covered by this declaration as consisted of fast land upon the banks of the river, or in islands which were private property, is, of course, to be paid for. But the flow of the stream was in no sense private property, and there is no room for a judicial review of the judgment of Congress that the flow of the river is not in excess of any possible need of navigation, or for a determination that if in excess, the riparian owners had any private property right in such excess which must be paid for if they have been excluded from the use of the same."

In United States vs. Duluth, et al., 25 Fed. Cases, page 923, Case 15001, it is said:

"It is, however, asserted that the states have a concurrent right to authorize improvements in the navigable waters of the United States in which their citizens are interested, so far as these waters lie within their territorial limits; and it is shown by affidavits, and by the statutes of Minnesota, that the canal here complained of is authorized by said state, and is important to her commerce, and is within her territory. That such a power can be exercised by the states may be admitted, when it does

not injure the general interest of commerce, and when it does not conflict with *any control assumed* by the federal government over the same locality.

"But all the reported cases which concede this power in the states agree that it exists only while the congress of the United States refrains from the assertion of its authority, and that, when the latter is called into exercise, it is not only paramount, but *exclusive*. Such is the principle asserted by the supreme court in Crandall vs. Nevada, 6 Wall. (73 U. S. 35), and in Gilman vs. Philadelphia, 3 Wall. (70 U. S. 713), and in Cooley vs. Board of Wardens, 12 How. (53 U. S. 299), in all of which the question is thoroughly examined."

Therefore, if in the judgment of Congress, any particular river or body of water is or may be the means of interstate or foreign commerce or of commerce with Indian tribes, and in the exercise of that judgment if Congress enacts a statute in which it declares its purpose to be to improve the same for the benefit of navigation, the question of the navigability or non-navigability of such stream or body of water, becomes material only to the extent that the determination of this question of *fact* has a bearing upon the question whether or not, Congress has authority to improve the stream without being subject to the limitations imposed by the Fifth Amendment or other provision of the Constitution; or whether, in subordination to the Constitution, proceedings in condemnation (in the absence of agreement) will be required as a prerequisite to the valid assertion of this plenary power. (U. S. vs. Cress, 243 U. S. 316, 326, and cases cited).

In the event such a stream is a navigable stream, no such proceedings are essential to the assertion of the power, because the United States is the owner of, and is vested with the actual title in and to such navigable waters for such purposes. (South Carolina vs. Georgia, 93 U. S. 1; U. S. vs. Chandler-Dunbar Co., 229 U. S. 53; Wisconsin vs. Duluth, 96 U. S. 379.)

In the event of the existence of any doubt upon the question of the navigability of a stream so proposed to be improved, necessarily Congress, in the exercise of its discretionary power, has authority to inquire into, determine and declare whether such stream is or is not a navigable one, over which it may assert jurisdiction, without the institution of proceedings in condemnation as shown by the authorities hereinbefore cited.

But in the event an interstate and international river, such as the Colorado River, is or may be the means of inter-state or foreign commerce, or commerce with Indian Tribes, and it should in fact be a non-navigable stream, that fact will not derogate from the power of Congress under the Constitution, by *appropriate means*, to make improvements in such a stream to benefit such commerce.

Wilson vs. Shaw, 204 U. S. 24, is a case which involved the authority of Congress under the commerce clause of the Constitution to construct and operate the Panama Canal and Railroad, and it is therein held that:

> "Under the commerce clause of the Constitution, congress has power to create interstate highways, including canals, and also those wholly within the territories and outside of State lines." (Syllabus)

In the course of the opinion, pages 33, 34 and 35, this court said:

> "PLAINTIFF contends that the Government has no power to engage anywhere in the work of constructing a railroad or canal. The decisions of this court are adverse to this contention. In California vs. Pacific Railroad Company, 127 U. S. 1, 39, it was said:
>
> "'It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress *has plenary power over the whole subject.* * * * Congress has likewise the power, exercised early in this century by successive acts in the Cumberland or National road, from

the Potomac across the Alleghanies to the Ohio, to authorize the construction of a public highway connecting several States. See Indiana vs. United States, 148 U. S. 148."

and on page 32 of the opinion, it is said:

"We have no supervising control over the political branch of the Government in its action within the limits of the Constitution. Jones vs. United States, 137 U. S. 202, and cases cited in the opinion; In re Cooper, 143 U. S. 472, 499, 503."

In such cases, however, the exercise of this power by Congress is subject to the guarantees prescribed by the Constitution for the security of private property and must be respected, (Union Bridge Company vs. United States 204, U. S. 364, 392); with the result that the appropriate means for the making of such improvements is by the enactment of statutes, wherein provision is made for the acquirement by agreement or by condemnation, of whatever rights of way and other property that may be essential to the accomplisment of the object intended, as was done in the enactment of the Boulder Canyon Project Act in the following words:

"That for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking, the Secretary of the Interior,

> subject to the terms of the Colorado River compact hereinafter mentioned, is hereby authorized to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canon; * * * and to acquire by proceedings in eminent domain, or otherwise, all lands, rights of way, and other property necessary for said purposes." (Bill, pp. 58-59.)

We, therefore, submit that by the enactment of this statute, the Congress of the United States has not only asserted control over the Colorado River for the declared purpose of improving its navigation, but in enacting the statute, it also made provision for the acquirement by proceedings in eminent domain or otherwise, of all lands, rights of way and other property necessary for the accomplishment of the purposes stated in the Act.

In so far, therefore, as the rights of Arizona in the beds or waters of said stream are concerned, if she has any *property* rights therein whereof she would be deprived as a result of the execution of this Act, in violation of the due process clause or other provision of the Constitution, certainly she is not without remedy; but this Bill of Complaint is framed upon no such theory. Its ground of attack against the constitutionality of the Act is limited to an allegation that the Act "is in excess of the powers granted to Congress by the Constitution" for certain specified reasons, all of which are based upon the major premise that Arizona has the sovereign jurisdiction and right to control the waters of the river, and not upon any allegation to the effect that rights of Arizona which are secured to it by the Tenth Amendment or any other provision of the Federal Constitu-

tion will be violated as the result of the execution of the Boulder Canyon Project Act.

It is therefore apparent that as respects the rights of Arizona, the Bill of Complaint presents nothing for the Court's consideration other than an alleged conflict of authority as between Arizona and the United States with respect to the control of the Colorado River, and that the only rights attempted to be asserted in the Bill are pure political rights which as stated by this honorable Court in Georgia vs. Stanton, 6 Wall. 50, 77, "are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a state with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, are presented by the Bill, in judicial form, for the judgment of the Court." They are, therefore, not subjects of judicial cognizance as held in that case and the other cases cited in our first brief; so, we submit, this case comes squarely within the principles stated by this honorable Court, speaking through Mr. Justice Sutherland in Florida vs. Mellon, 273 U. S. 12, at page 17:

> "If the act *interferes* with the exercise by the State of its full powers of taxation or has the effect of removing property *from its reach*, which otherwise would be within it, that is a contingency which affords no ground for judicial relief. The act is a law of the United States made in pursuance of the Constitution and, therefore, the supreme law of the land, the constitution or laws of the states to the contrary notwithstanding. *Whenever the constitutional powers of the federal government and those of state come into conflict, the latter must yield.* Ex parte Virginia, 100 U. S.

339, 346; Brown vs. Walker, 161 U. S. 591, 606; Cummings vs. Chicago, 188 U. S. 410, 428; Lane County vs. Oregon, 7 Wall. 71, 77."

"The claim of immediate injury to the state rests upon the allegation that the act will have the *result* of inducing potential taxpayers to withdraw property from the state, thereby diminishing the subjects upon which the state power of taxation may operate. The averment to that effect, however, affords no basis for relief, because, not only is the state's *right* of *taxation subordinate* to that of the general government, but the anticipated result is purely speculative to and, at most, only remote and indirect. * * * Plainly, there is no substance in the contention that the state has sustained, or is immediately in danger of sustaining, any *direct* injury as the result of the enforcement of the act in question. See In re Ayers, 123 U. S. 443, 496; Massachusetts vs. Mellon, 262 U. S. 447, 488."

"Nor can the suit be maintained by the State because of any injury of its citizens. They are also citizens of the United States and subject to its laws. In respect of their relations with the federal government 'it is the United States, and not the State, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status."

Massachusetts vs. Mellon, *supra*, pp. 487-486.

"It follows that leave to file the bill of complaint must be denied."

Likewise it comes squarely within the principles declared in Van Brocklin vs. Tennessee, 117 U. S. 151; wherein it is said:

"While the power of taxation is one of vital importance, retained by the States, not abridged

by the grant of a similar power to the government of the Union, but to be concurrently exercised by the two governments, yet even this power of a State is subordinate to and may be controlled by the Constitution of the United States. That Constitution and the laws made in pursuance thereof are supreme; they control the Constitutions and laws of the respective States and cannot be controlled by them. The people of a State give to their government a right of taxing themselves and their property at its discretion. But the means employed by the government of the Union are given by the people of all the States; and, being given by all for the benefit of all, should be subjected to that government only which belongs to all. All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. The sovereignty of a State extends to everything which *exists by its own authority*, or is *introduced* by *its permisson;* but *does not extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States.* The attempt to use the taxing power of a State on the means employed by the government of the Union, in pursuance of the Constitution, it itself an abuse, because it is the usurpation of a power which the people of a single State cannot give. * * * The States have no power, by taxation or otherwise, to retard, impede, burden or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government."

As shown hereinbefore, "Congress has power which is paramount to that of the State to make improvements in the navigable streams of the United States,

and for this purpose *to determine and declare what waters are navigable"* (45 C. J. 433-434); consequently, when in the enactment of the Boulder Canyon Project Act it declared the purpose thereof to be the improvement of the navigation of the stream, and by a representative of the executive department of the Government (upon whom the act conferred broad powers of discretion and judgment), in asserting full charge and control of said river and said waters to the exclusion of the State of Arizona, as alleged in paragraphs XXX, XXXI, XXXII and XXXIII of the Bill, it acted in the exercise of a "sovereign and supreme power within its appropriate *sphere* of action", (Wisconsin vs. Duluth, 96 U. S. 379; 45 C. J. 420, and cases cited), and its action in that respect conclusively binds this honorable court, for the reason that it constitutes a supreme law of the land, based upon a finding of fact which was a prerequisite to its enactment, and which constitutes a final determination of that question of fact "as fully and as effectually as a final judgment of a competent judicial tribunal of general jurisdiction would do in like cases," as will be shown in the course of the argument.

Said act having been passed by the Congress in the exercise of a power clearly *within* the *limits* of the powers *granted* to it by the constitution, it can not be said to be in *excess* of the powers so granted and must, therefore, be held to be a constitutional law of the land as against any attack made or that might be made in such a bill of complaint as that in the instant case or in any other bill that might be filed.

Whether or not the Colorado River is a navigable stream is wholly immaterial in the face of such an

assertion of power by Congress for the declared purpose of exercising an authority so clearly conferred upon it by the constitution. Whether that power has been rightfully or wrongfully asserted in a particular case, it is a power which the constitution clearly confers upon Congress, as shown hereinbefore, and its exercise in any case is a matter within its discretion and judgment, which, when exercised, is conclusive upon the courts, because such discretion and judgment are clearly political, (Mississippi vs. Johnson, *supra;* Wisconsin vs. Duluth, *supra*).

ALLEGATIONS IN RESPECT OF THE NAVIGABILITY OF THE COLORADO RIVER AND THE RECLAMATION OF PUBLIC LANDS.

Under the foregoing heading, in our first brief, from page 15 to page 21, we called special attention to certain allegations shown on pages 6, 7, 31 and 32 of the bill of complaint, for the distinct purpose of showing that, instead of said allegations having been made for the purpose of *stating a cause* of *action* or *ground* for *relief* in equity, they constitute a clear and deliberate attack upon the motive or purpose of congress in declaring its purpose when enacting the Boulder Canyon Project Act. Instead of attempting to answer the argument so made by us, under the heading: "The motions to dismiss admit Arizona's allegation that Colorado River is non-navigable. This is an allegation of fact, not a conclusion of law. If insufficiently pleaded, non-navigability is presumed," on page 46 of Arizona's brief it is said that: "Colorado, New Mexico and Nevada are asking the court to disregard Arizona's allegations that the Colorado River is not navigable, and to hold without allegation

or proof, that it is in fact a non-navigable river. They put this request upon the ground that the allegation of non-navigability is not an allegation of fact, but a mere conclusion of law."

This statement shows either a misconception or an attempt to evade the position taken and the question propounded in the brief of Colorado, New Mexico and Nevada. While they do ask the court to disregard the allegations of the bill to which reference is made, for the distinct reason that they were made for no other than the purpose of questioning the motive and purpose of Congress in declaring the purpose of the Act, they are *not* asking the court to make a finding of fact to the effect that the Colorado River "is in fact a navigable river"; but assert that Congress, having authorized the Secretary of the Interior to construct, operate and maintain a dam and incidental works, etc" * * * in the main stream of the Colorado River" for the declared purpose of improving its navigation, the court is bound, as a matter of law, by the *conclusive presumption* that the river is in fact a navigable river, over which Congress might rightfully assert sovereign control for that declared purpose, and that there is no justification for the court to look beyond the face of the Boulder Canyon Project Act to make any finding whatever in respect of the navigability of the Colorado River. Their position is that whether the Colorado River is or is not a navigable stream, this Honorable Court cannot look beyond the face of the Boulder Canyon Project Act (the provisions of which it must take judicial notice, as a matter of law), for the determination of any question of fact which was a prerequisite to the enactment of the statute. (Our first brief, page 21.)

Reference to our first brief, pages 15 to 21, will show that our discussion of the allegations shown at pages 6, 7, 31 and 32 of the bill of complaint, in respect to the navigability of the Colorado River, are for the sole and distinct object of showing that those allegations were not made for the purpose "of stating a cause of action for equitable relief against the enforcement or carrying out of the act of congress or the six state compact," but were "without equivocation made for the distinct purpose of questioning the *motive* and *purpose* of Congress in enacting the Boulder Canyon Project Act, (our brief, page 15); and "That in so far as these allegations are concerned, the bill does not even contemplate the statement of a cause of action or of an *issue* of *fact* relied upon by the complaint as a ground for relief in equity, but that these allegations were made for the sole purpose and with the distinct intent of laying a foundation for questioning the *motives* and *purposes* of Congress in enacting the Boulder Canyon Project Act." (Brief, page 20), which was done in no uncertain terms at pages 31 and 32 of the bill. (Our brief, page 15).

Again, at page 19 of our first brief:

> "We submit that it is apparent upon the face of the bill that no *issuable fact*, whatever in respect of the navigability of the Colorado River or the reclamation of public lands, is raised by the bill and that in respect of both * * * the allegations consist only in *argumentative statements* made for the purpose of laying the foundation for the *conclusions* that:
>
> (a) Because of said conditions, said river has never been and is not now a navigable river. (Bill, page 7);

(b) The recital in said Act that the purpose thereof is the improvement of navigation and the reclamation of public lands is a mere *subterfuge* and *false pretense.*" (Bill, 31.)

Notwithstanding the unmistakable intent and purpose of the foregoing statements quoted from our first brief, on page 46 of complainant's brief it is said concerning the supposed request which Arizona says we made, that we put said supposed request "upon the ground that the allegation of non-navigability is not an allegation of fact, but a mere conclusion of law", and that the authorities cited "in support of this contention, (pages 17, 18) did not in fact support it. No question of the navigability or non-navigability was involved in any of the cited cases." (Arizona's brief, pages 46, 47.)

We not only did not make any such request, but submit that the whole purpose, tenor and effect of our argument from page 15 to page 21 of our first brief, was to establish that the allegations of the bill to which reference was made, not only "do not state any issuable fact" but "that they were not intended to state a cause of action or even remotely relied upon as a ground for relief." (Our brief, page 16.)

The whole argument was framed and made upon the assumption that Arizona not only intended to attack the motives and purposes of Congress in the enactment of the statute, as she clearly did, but that she knew full well when the bill was framed, no issuable fact or cause of action for equitable relief could by any possibility be alleged by her on the basis of non-navigability of the Colorado River, for reasons that will be shown as we proceed.

Arizona's brief says: "that no question of the sufficiency or insufficiency of allegations of navigability was involved in any of the cases cited on page 18 of our first brief," except in certain of them "wherein the question was treated as a question of fact, and, without exception it has been so treated when it has arisen in this court." But those cases were not cited upon that theory at all, but for the purpose of supporting the proposition that any or all of the obstructions alleged on pages 6 and 7 of the bill of complaint might exist in fact without rendering the river a non-navigable stream, and that the existence or non-existence of such obstructions as are alleged in the bill do not furnish the true criterion by which the navigability or non-navigability of the stream is to be determined. The clear intent and purpose of these citations were, therefore, to show that the allegations shown on pages 6 and 7 of the bill of complaint, were not made for the purpose of raising an issuable fact but for the purpose of laying a foundation for questioning the motives and purposes of congress in its declaration of its purpose in enacting the statute.

Counsel for Arizona call attention to our citation of the case of Walker vs. Allen, 72 Ala. 456, which was cited in support of our statement on page 18 of our brief that "the allegations of this bill amount to nothing more than that the Colorado River is not a navigable stream," and for that reason could in any event be nothing more than the allegation of a pure legal conclusion.

Again, we simply credited opposing counsel with knowledge of this proposition of law, and made the statement for the purpose of showing that they,

legally, could *not* have made the allegations to which reference was made for the purpose of stating an *issuable* fact or a cause of action for relief in equity; but opposing counsel deduce from the Alabama case the conclusion that, because it is a prima facie presumption that streams above tide water are prima facie private—not navigable—in cases wherein an issue of fact is raised between parties litigant in a *judicial* proceeding, that rule applies to a case such as this, wherein Congress has, in the exercise of political power asserted control over a particular river and the complainant attacks the constitutionality of that action on the part of *Congress*. They state that:

> "Rivers not known to be navigable are generally presumed to be non-navigable and whoever asserts their navigability has the burden of proof.
>
> "It thus becomes unnecessary to consider whether in this case the non-navigability of the Colorado River has been sufficiently pleaded, since, if insufficiently pleaded, it will be presumed."

But this purports to be a suit to test the constitutionality, and enjoin the enforcement of, an act of Congress, the presumption in favor of the validity of which is so strong as to require such an act to be shown to be invalid beyond reasonable doubt.

As shown hereinbefore, no independent investigation of facts can be made by the court for the purpose of such decision because of the conclusive presumption that all facts prerequisite to enable Congress to act on such a subject were ascertained and determined prior to the enactment of the statute, and

as the Alabama Court says in *Walker vs. Alabama*, 72 Ala. 458:

> "When the facts are ascertained, whether a stream is navigable, is a question of law. The whole question is a mixed question of fact and law."

Consequently, since Congress is conclusively presumed, as a matter of law, to have ascertained and made a legislative determination of the fact that the Colorado River is a navigable stream by the enactment of the Boulder Canyon Project Act, the question whether the river is navigable has been reduced to a pure question of law by the enactment of the statute. There is, therefore, no issue involved in or that could be raised in respect of the navigability of the Colorado River by the bill of complaint filed in this suit upon which any presumption or finding of fact could be based by the court for the purpose of determining the constitutional validity or invalidity of the act of Congress in question, or of the actions of the Secretary of the Interior in executing it.

1. The Court is Bound by the Declaration of Purposes Contained in the Act and May Not Question the Motive or Purpose of Congress in Its Enactment.

On page 54 of complainant's brief it is said:

> "The court is not bound by the declaration of purposes contained in the act, but may determine its real purpose by considering its effect."
> "Even if the Colorado River were conceded to be navigable, it would still be necessary to in-

quire whether improvement of navigation is the purpose of the Boulder Canyon Project Act. The Act contains a recital that improvement of navigation is one of its purposes (Bill, 58), but the bill alleges that this is a mere subterfuge and false pretense. (Bill, 31.)

* * * * * * * * *

"Colorado, New Mexico and Nevada are asking the Court to disregard this allegation and to accept without qualification the declaration of purposes contained in the act. * * *

They "put their request upon the ground that Arizona is thereby attempting to question the 'motives' of congress. (Colorado Brief, 15, 20)."

It is especially to be noticed that according to the foregoing statements, our asserted request is said to have been put upon the ground that Arizona is thereby attempting to question only the "MOTIVE" of congress, when throughout our discussion of the subject from page 15 to 21 of our first brief, we use the words "motives and purposes".

It is also especially noticeable that the complainant's brief says that:

"Arizona is attempting to do no such thing. The allegation in question is aimed, *not* at the *motives* of Congress, but at the *purpose* and *effect* of the Act. The motives of Congress are nowhere mentioned or referred to."

Then they admit that the allegation is aimed at the purpose of the *Act*.

After having admitted the principle stated in Smith vs. Kansas City Title & Trust Co., 225 U. S. 180, 210 (Colorado Brief, 20), the brief says that:

"It does not follow, nor is it true, that when Congress has *exceeded* the *limits* of its constitutional authority, *it* may avoid judicial inquiry into the validity of *its* act by inserting therein a *false* declaration of purposes. State legislatures are likewise presumed to act with full knowledge and in good faith, as was held in United States vs. Des Moines Navigation & Ry. Co., 142 U. S. 510, 544, and Atchison, Topeka & Santa Fe R. R. Co. vs. Matthews, 174 U. S. 96, 104 (Colorado Brief, 21), but this does not preclude an inquiry as to whether the declared purpose of legislation is its true purpose." (Complainant's Brief, pages 54, 55.)

From the foregoing we submit that it is apparent that Arizona has with one breath drawn a clear cut distinction between an allegation which is aimed at the *motives* of *Congress*, and one that it is aimed at the "purpose and effect of the *act*"; and with the next, has, at least inferentially, assumed and asserted that *congress* has exceeded the limits of its constitutional authority, by inserting in the Act, a *false* declaration of purposes and thereby *attempted* to *avoid judicial inquiry* into the validity of the Boulder Canyon Project Act. We furthermore submit that this constitutes a plain assertion that such *false* declaration is to be and has been attributed to *congress* instead of to the *legislation* which congress has enacted, and that this assertion of itself, constitutes an admission, however unintentional, that "the *recital* (which Congress has made) in said act that the purpose thereof is the improvement of navigation and the reclamation of public lands *is* (itself) a mere subterfuge and false pretense, and is therefore in fact an attack upon the motive and purpose that Con-

gress entertained and in which it indulged when it made said *recital.*

Furthermore, the foregoing statements are immediately followed by the statement of the premise which Arizona has stated and assumed as its major premise upon which to base the whole argument made by it on pages 55 to 60 of its brief, as follows:

> "That this court is not bound by such *legislative declarations,* but may determine the true *purpose* of *legislation* by considering *its* effect is well settled." (Arizona's Brief, page 55.)

While it is true that courts may determine the true *purpose* of *legislation* by considering *its* effect upon the personal or property rights of others; that is an altogether different proposition from the one we propounded and discussed at length at pages 12 to 21 of our first brief, to wit; that courts cannot enter upon an independent inquiry as to the purpose or motive of the legislature or congress, when in its consideration of legislation concerning a particular subject it makes a declaration of the purpose or object which it intends to accomplish, through the agency of the executive department of the government, by the enactment of the legislation; and especially when that declaration of purpose constitutes and embodies a finding or legislative determination of *fact* which is a prerequisite to, and upon the existence or non-existence of which, the right or authority of the legislature to legislate upon the particular subject of the act depends.

We, therefore, submit that it is apparent upon the face of Arizona's own brief that the argument it has made is not only based upon the assumption that congress in its declaration of the purposes of the

Act was guilty of a "subterfuge and false pretense" by reason of which it exceeded the constitutional limits of its authority in enacting the Boulder Canyon Project Act, but that its major premise upon which that argument is bottomed, instead of meeting the issue we presented in our first brief, passes it by without answer and cites cases to support a false premise that has no bearing whatever upon the question we raised and presented in such detail in our first brief.

We again submit, as heretofore, that:

> "At pages 6, 7, 31 and 32, the bill contains allegations concerning the navigability of the Colorado River and the reclamation of public lands, which, instead of having been made for the purpose of stating a cause of action for equitable relief against the enforcement or carrying out of the act of congress or the Six States Compact, are, without equivocation, made for the distinct purpose of questioning the motives and purposes of congress in enacting the Boulder Canyon Project Act. * * *" (Our Brief, page 15).
>
> "That said allegations do not state any issuable fact and that they were not intended to state a cause of action or even remotely relied upon as a ground for relief, we submit is rendered doubly apparent by the further facts appearing on the face of the bill." (Our Brief, page 16.)
>
> "(4) Section I of the Boulder Canyon Project Act declares the purposes of congress in its enactment to be 'improving navigation * * * reclamation of public lands (etc)'. This declaration of purpose having been made by congress itself in enacting the statute, the court is bound by the conclusive presumption that any facts essential to the validity of the act did in fact

> exist at the time of its enactment, and if any special finding of these facts was required to warrant the passage of the act, for the purposes of this case, the fact that congress enacted the statute, and, in so doing, declared its purpose to be the improvement of navigation, is the equivalent of such a finding." (Our Brief, page 21.)

The paragraph last above quoted is the one to which reference is made on page 54 of the complainant's brief in the statements that "the act contains a *recital* that the improvement of navigation is one of its purposes, but the bill alleges *this* is a mere subterfuge and false pretense. * * * Colorado, New Mexico and Nevada are asking the court to disregard *this* allegation and to accept without question the declaration of purposes contained in the act."

In its further comments complainant's brief attempts to sidetrack the propositions involved in that paragraph by the half true assertions that:

> "State legislatures are likewise presumed to act with full knowledge and in good faith, as was held in United States vs. Des Moines Navigation and Ry. Co., 142 U. S. 510, 544, and Atchison, Topeka & Santa Fe R. R. Co., vs. Matthews, 174 U. S. 96-104. (Colorado Brief page 21); but this does not preclude an inquiry as to whether the declared purpose of legislation is its true purpose."
>
> "That this court is not bound by such legislative declarations but may determine the true purpose of legislation by considering its effect is well settled." (Complainant's brief, page 55.)

But these assertions neither state nor pretend to answer the propositions asserted in that paragraph,

the substance of which are that the final action of a legislative department of Government terminating in an act of legislation in due form, must of necessity presuppose and determine all facts prerequisite to the enactment of the legislation, and when such facts are so determined by such a legislative body, that determination must conclude further inquiry by all other departments of the Government.

It is true that in United States vs. Des Moines Navigation & Ry. Co., 142 U. S. 510, 544, to which complainant's brief refers, at page 544, it is said that:

> "The knowledge and good faith of a legislature are *not open* to question;"

but it does not stop there. It goes further and says:

> "It is *conclusively presumed* that a legislature acts with full knowledge and in good faith. It is true the bill alleges that its passage was induced by the navigation company, by false representations and threats of suits; but such an allegation amounts to nothing. In Cooley's Constitutional Limitations (5th ed. 222), the author, citing several cases, observes: 'From what examination has been given to this subject, it appears that whether a statute is constitutional or not is *always* a *question of power*; that is, a question whether the legislature in the *particular* case, in respect to the *subject matter* of the act, the *manner* in which its *object* is to be accomplished and the mode of enacting it, *has kept within the constitutional limits and observed the constitutional conditions.* In any case in which this question is answered in the affirmative the courts are not at liberty to inquire into the proper exercise of the power. They must assume that *legislative discretion* has been *properly exercised.* If evi-

dence was required, it must be supposed that it was before the legislature when the act was passed; and if any special finding was required to warrant the passage of the special act, it would seem that the passage of the act itself might be held to be equivalent to such finding. And, although it has sometimes been urged at the bar that the courts ought to inquire into the motives of the legislature where fraud and corruption were alleged, and annul their action if the allegations were established, the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered upon." See also Fletcher vs. Peck, 6 Cranch, 87; Ex parte McCardle, 7 Wall 506; Doyle vs. Continental Insurance Co., 94 U. S. 535; Powell vs. Pennsylvania, 127 U. S. 678."

It will be noticed that the foregoing quotation from Cooley's Constitutional Limitations is made with approval and precludes the intimation contained in complainant's brief that the principle enunciated in that case was limited to the proposition that "State Legislatures are presumed to act with full knowledge and good faith." That the principle involved is not of limited application to the acts of State legislatures alone, but is applicable to the legislative acts of congress as well, we submit is a thoroughly established principle.

In United States vs. Des Moines, etc. Co., *supra*, at page 545, this court says further:

"And here the significance of this resolution is evident. It is passed by Congress after the settlement, proposed by the Iowa legislature of 1858, had been accepted by the navigation company, and deeds had passed in accordance there-

with. Its passage imports full knowledge of antecedent facts upon which it is based. In Powell vs. Pennsylvania, 127 U. S. 678, 686, referring to action had by the legislature of the State, this court said: 'The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record,' etc."

In *Chesapeake & Potomac Tel. Co. vs. Manning*, 187 U. S. 238, at page 245, this court said:

"Counsel for the company make these observations: 'And if the legislature cannot authorize a commission to fix rates without giving the corporations interested opportunity to be heard, it is hard to see how the legislature itself can do so, not only without giving an opportunity for a hearing, but, as is admitted to be the fact in this case, without making even any ex parte investigation.'

"But it is well settled that the courts always presume that the legislature acts advisedly and with full knowledge of the situation. Such knowledge can be acquired in other ways than by the formal investigation of a committee, and courts cannot inquire how the legislature obtained its knowledge. They must accept its action as that of a body having full power to act, and only acting when it has acquired sufficient information to justify its action."

In *Lusher vs. Scites*, 4 W. Va. 11, at page 14, it is said:

"The power to form new counties, it is conceded, belongs to the legislature alone under the constitution, but before this power can be right-

fully exercised, it must be made to appear affirmatively: 1. That the proposed new county does contain an area of at least four hundred square miles. 2. That no other county is thereby reduced below that area. (etc) * * * When all these facts are made to appear to the satisfaction of the legislature, then, and not till then, an act creating the proposed new county may be passed. The legal presumption therefore is, that when the act creating the county of Lincoln was passed, all these facts had been proved to the satisfaction of the legislature, otherwise that body would not and could not have passed the act. All its members were sworn to support the constitution of the State, and it is not to be presumed that they would violate their oaths of office by passing the act in question, without proof necessary to enable them to do so.

"Not only does the subject of making new counties belong to the legislature, but it belongs to no other department of the government. To exercise the power, the legislature must inform itself of the existence of the facts prerequisite to enable it to act on the subject. How it shall do so, and on what evidence, the legislature alone must determine and when so determined, it must conclude further inquiry by all other departments of the government; and the final action terminating in an act of legislation in due form, must of necessity presuppose and determine all the facts prerequisite to the enactment; and that too, as fully and as effectually as a final judgment of a competent judicial tribunal of general jurisdiction would do in like case."

De Camp vs. Eveland, 19 Barbour 81, was a case similar to the West Virginia case quoted from above. At pages 89-90, the New York Court says:

"The constitution declares that the legislative power of the state is vested in the senate and assembly. This legislative power is the very highest attribute of sovereignty, and its depository the embodiment and concentration of the whole political force of the body politic, with such restraints only as the charter of government has imposed. It is the lawmaking power, and, as heretofore remarked, superior to either of the other departments of government. The legislature are nowhere restrained, directed or limited in regard to the nature, grade or character of evidence which they must have as the basis of their action, or to guide them in their decisions. In some specified cases their power is limited, and in others conditional, depending upon the existence of certain facts. But they must necessarily decide whether such facts exist. Their general power to prescribe and regulate evidence for every other tribunal in the state has never been questioned, and it would present a singular anomaly if they were wanting in power to do the same for themselves, or to alter and change the same at pleasure; and it would be equally strange if any judicial tribunal in the state were permitted to review their decision upon the question of fact, on the existence of which their power to legislate in a particular case is made to depend. If such a thing were to be tolerated, it is not perceived why the existence of the fact in question may not and in many cases must not, be proper to be submitted to a jury. It is believed that but few would be bold enough to contend for a principle pregnant with such absurd results. In the present case it is contended that the legislature have assumed the existence of the fact, in reference to population, without evidence. But this does not appear, and is not to be presumed. On the contrary, we are bound to presume they acted upon good and

sufficient evidence; and this presumption, from the nature of the case, must be conclusive. That we are not in possession of the facts or the evidence of them, which the legislature had, amounts to nothing in the argument. It is rare, if ever, that a statute contains a recital of them, and is not necessary in any case."

The foregoing paragraphs are but a few applications of the general principles of constitutional law, which support the authority of legislative bodies to make a legislative determination of facts, in all cases wherein the constitutionality of a particular statute, depends upon the existence or non-existence of certain facts, and of the inability of courts to make an independent investigation of such facts, when called upon to judicially determine the constitutionality of such statutes.

In 6 R. C. L. pages 112, 113, these general principles are stated as follows:

"Legislative Determination of Facts.—On frequent occasions the constitutionality of a statute depends on the existence or non-existence of certain facts. In view of the presumption in favor of the validity of statutes, it must be supposed that the legislature had before it when the statute was passed any evidence that was required to enable it to act; and if any special finding of fact was needed in order to warrant the passage of the particular act, the passage of the act itself is treated as the equivalent of such finding. The validity of legislation which would be necessary or proper under a given state of facts does not depend on the actual existence of the supposed facts. It is enough if the law-making body may rationally believe such facts to be established. Under the American system of

government by the people through their chosen representatives, practical legislation admits of no other standard of action. The fact that the finding of the legislature is in favor of the truth of one side of a matter as to which there is still room for difference of opinion is not material. What the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not. It has been said that any other basis would conflict with the spirit of the constitution, and would sanction measures opposed to a republican form of government. As a general rule, therefore, it may be stated that the determination of facts required for the proper enactment of statutes is for the legislature alone, that the presumption as to the correctness of its findings is conclusive, and that the courts do not have jurisdiction or power to re-open the question or make new findings of fact. The same principles have been applied in defining the function of the court in reviewing ordinances of municipal corporations.

"JUDICIAL DETERMINATION OF FACTS.—The constitutionality of a law is not to be determined on a question of fact to be ascertained by the court. If under any possible state of facts an act would be constitutional, the courts are bound to presume that such facts exists; and therefore the courts will not make a separate investigation of the facts, or attempt to decide whether the legislature has reached a correct conclusion with respect to them. * * *

"Under certain circumstances, however, questions of fact may be necessarily involved in a judicial determination as to the constitutionality of a statute, as where the validity of a law regulating the charges of a public service corporation depends on whether the rates so established amount under the particular circumstances of a

case to a taking of property without due process of law. * * * In such cases the general rule seems to be that where a party seeks to question the constitutionality of a statute upon a ground which involves a question of fact, he must in some appropriate way raise it in the trial court and present the testimony upon which he relies to establish such facts."

2. The Allegations in Respect of Navigability on Pages 6, 7, 31 and 32, of Complainant's Bill Do Constitute a Direct Attack Upon the Motive and Purpose of Congress in Its Enactment of the Boulder Canyon Project Act.

Complainant's brief at page 54 says:

"Arizona is attempting no such thing. The allegation in question is aimed not at the *motives* of *Congress*, but at the *purpose* and *effect* of the *act*."

In this manner she distinguishes between an allegation which is aimed at the motives of Congress and one which is aimed at a consideration of the effect of a statute enacted by Congress. In keeping with this distinction, she has assumed and stated her major proposition to be:

> "That this court is not bound by such legislative *declarations* but may determine the true purpose of legislation *by considering its* effect is well settled." (page 55.)

Thus, as shown hereinbefore, Arizona has ingeniously evaded the proposition propounded and discussed at length in our first brief at pages 15 to 21,

and in so doing, has attempted to escape the inevitable effect of an attack upon the motive and purpose of Congress in enacting the Boulder Canyon Project Act, and to secure a decision upon our motion to dismiss by an attempt to state a proposition which is a clear departure, not only from the proposition propounded by us, but from the alleged ground of unconstitutionality which she herself has made in her attack against the validity of the Boulder Canyon Project Act.

But, we submit that this ingenious distinction which she draws between an allegation aimed at the *motives* of *Congress* and an allegation made for the purpose of securing a consideration of the *effect* of a statute enacted by Congress, in no sense tends to refute the proposition which we propounded and discussed in our first brief; nor does it afford a way of escape from that proposition by its attempt to distinguish and assert the existence of a supposed distinction, between an attack upon the "*motives*" of *Congress*, and an attack upon the "*purposes*" of Congress, in making "such legislative declarations"; nor does it in any sense support the allegations upon which the bill of complaint attacks the constitutionality of the Act, to wit: that it is in *excess* of the powers granted to Congress, by the United States Constitution.

That an attack upon the "motives" of Congress and an attack upon the "purposes" of Congress, in making "such legislative declarations" are synonymous with each other and are attended by exactly the same legal consequences, we submit, is as thoroughly settled as is the proposition that this court may *determine* the true *purpose* of *legislation by considering its effect*.

In McCray vs. United States, 195 U. S. 27, at pages

53-56, the late Chief Justice White, in his masterly style, gave thorough consideration to this subject, and, in so doing, said:

> "For instance, all of the propositions obviously rest not only on inferences drawn from the face of the acts, but also on deductions made from what it is assumed must have been the motives or purposes of Congress in passing them. To avoid confusion and repetition we shall consider these distinct contentions separately, and we hence come, first, to ascertain how far, if at all, the *motives* or *purposes* of Congress are open to judicial inquiry in considering the power of that body to enact the laws in question. Having determined the question of our right to consider *motive* or *purpose*, we shall then approach the propositions relied on by the light of the correct rule on the subject of *purpose* or *motive*.
>
> "Whilst, as a result of our written constitution, it is axiomatic that the judicial department of the government is charged with the solemn duty of enforcing the Constitution, and therefore in cases properly presented, of determining whether a given manifestation of authority has exceeded the power conferred by that instrument, no instance is afforded from the foundation of the government where an act, which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust. To announce such a principle would amount to declaring that in our constitutional system the judiciary was not only charged with the duty of upholding the Constitution but also with the responsibility of correcting every possible abuse arising from the exercise by the other departments of their conceded authority. So to hold would be to overthrow the entire distinction between the legislative, judicial and

executive departments of the government, upon which our system is founded, and would be a mere act of judicial usurpation.

"It is, however, argued if a lawful power may be exerted for an unlawful purpose, and thus be abusing the power it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the authority conferred by the Constitution, will be of no avail. This, when reduced to its last analysis, comes to this, that because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department.

"The proposition, if sustained, would destroy all distinction between the powers of the respective departments of the government, would put an end to that confidence and respect for each other which it was the purpose of the Constitution to uphold, and would thus be full of danger to the permanence of our institutions. * * * *

"It is, of course, true, as suggested, that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the government where a wrong *motive* or *purpose* has impelled to the exertion of the power, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power. This was aptly pointed out in

Champion vs. Ames, 188 U. S. 321, where, speaking through Mr. Justice Harlan, it was said (p. 363):

> 'But if what Congress does is within the limits of its power, and is simply the limits of its power, and is simply unwise or injurious, the remedy is that suggested by Chief Justice Marshall in Gibbons vs. Ogden, when he said: "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."'

> "The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful *purpose* or *motive* has caused the power to be exerted. As we have previously said, from the beginning no case can be found announcing such a doctrine, and on the contrary the doctrine of a number of cases is inconsistent with its existence."

The following cases are in full consonance with *McCray* vs. *United States, supra*:

Dakota Central Tel. Co., et al. vs. State South Dakota, et al., 250 U. S. 163, 184, 187.
Hamilton vs. Ky. Dist. Co., 251 U. S. 146, 161.
Powell vs. Pa., 127 U. S. 678, 685.
Ex Parte McCardie, 7 Wall. 506.
Fletcher vs. Peck, 6 Crouch 87.
McLean vs. Arkansas, 211 U. S. 547, 548.
C. B. & Q. R. R. Co. vs. McQuire, 219 U. S. 549 (569).

Green, et al. vs. Frazier, 253 U. S. 233 (239, 240).
Brushaber vs. Union Pac. R. R., 240 U. S. 1, 25.
Laurel Hill Cemetery vs. San Francisco, 216 U. S. 358.
Mutual Loan Co. vs. Martel, 222 U. S. 225.
Patton vs. Brady, 184 U. S. 608, 620, 621.
Flint vs. Stone Tracy Co., 220 U. S. 107 (167) 169.
Lottery case, 188 U. S. 321, 362, 363.

THE BILL OF COMPLAINT DOES NOT STATE A CAUSE OF ACTION FOR RELIEF IN EQUITY.

Since "the decisions of this court from the beginning, lend no support whatever to the assumption that the judiciary may restrain the exercise of *lawful power*, on the assumption that a wrongful *purpose* or *motive* has caused a power to be exerted," and, since as stated in *United States vs. Des Moines etc. Co.*, 142 U. S. at page 544, "it appears that whether a statute is constitutional or not is *always a question of power*," and the power of Congress to act, in every case, is to be determined by a decision of the question whether or not it acts, "within the limits of its constitutional authority," it follows as a necessary consequence, that the only question raised by the bill of complaint, as a ground of attack against the constitutionality of the Boulder Canyon Project Act, is that involved in the proposition that said act, "is in excess of the powers granted to Congress by the Constitution of the United States, and is unconstitutional and void," for the reasons specified on pages 29, 30 and 31 of the bill; and all of which are based upon the proposition that the "sovereign jurisdiction and right to control the water

and other natural resources of Arizona" are threatened by and will be injured by the execution of this act of Congress. But, since the rights so claimed by Arizona, on the basis of the invalidity of the act are, as shown hereinbefore, pure political rights, of which this court cannot take judicial coznizance, it follows, as a further necessary conclusion, that the bill of complaint does not state a cause of action for relief in equity.

Again, alleging, as it does, that Congress, through the agency of a representative of the executive department of the government, has taken full charge and control of the Colorado River and its waters, dam sites, reservoir sites; has excluded Arizona therefrom, and has commenced the work, and is now carrying out the provisions of the Boulder Canyon Project Act, the bill of complaint, on its face, affirmatively states facts which altogether preclude any court of equity from giving any consideration whatever to its prayer for relief. (See par. XX, page 23, par. XXX, XXXI, XXXII, XXXIII on pages 32, 33, 34, 35 and 36 of the bill.)

This honorable court has had occasion to pass upon an exactly similar state of facts. Wisconsin vs. Duluth, 96 U. S. 379, was a case in which "a bill in chancery was filed in this court by the State of Wisconsin, by virtue of the constitutional provision which confers upon the court jurisdiction of suits between the States and between a State and citizens of other States," in deciding this identical question Mr. Justice Miller, in delivering the opinion of the court, said:

> "The present suit was brought by the State of Wisconsin, on the ground that the *channel* of the

St. Louis river, as it flowed in a state of nature, *was the common boundary* between that State and the State of Minnesota, and that she has an interest in the *continuance* of the channel as an important highway for navigation and commerce in its natural and usual course. That the canal cut by Duluth across Minnesota Point, deeper than the natural outlet of the St. Louis River at its mouth, has diverted, and will continue to divert, the current of the river through Superior Bay into the lake by way of that canal. That the result of this is, that while the current cuts that canal deeper and gives an outlet for the water there at a lower level, it at the same time, by diverting this current from the old outlet; causes it to fill up, and thus destroys the usefulness of the river and bay as an aid of commerce, on which the State had a right to rely. The bill, after reciting the facts which we have already detailed, insists that the city of Duluth cannot, by any right of her own nor by any authority conferred on her by the State of Minnesota, thus divert the waters of the stream—the St. Louis River—from their natural course, to the prejudice of the rights of the State of Wisconsin or of her citizens. It declares that this canal at Duluth does this in violation of law; and it prays of this court to enjoin Duluth from protecting or maintaining it, and by way of mandatory injunction to compel that city to fill up the canal and restore things in that regard to the condition of nature in which they were before the canal was made. * * *

"The answer also sets up, as an affirmative *defence* to the *relief sought by the bill, that the United States, by the legislative and executive departments of the government, have approved of the construction of the canal, have taken possession and control of the work, have appropriated and spent money on it, and adopted it as the best mode of making a safe and accessible harbor at*

the western end of the great system of lake navigation.

"Many very interesting questions have been argued, and ably argued, by counsel, which we have not found it necessary to decide. The counsel for defence deny that the State of Wisconsin has any such *legal interest* in the flow of the waters in their natural course as authorizes her to maintain a suit for their diversion. It is argued that this court can take *cognizance* of no question which concerns *alone* the rights of a State in her *political* or *sovereign* character. That to sustain the suit she must have some proprietary interest which is affected by the defendant. This question has been raised and discussed in almost every case brought before us by a State in virtue of the original jurisdiction of the court. We do not find it necessary to make any decision on the point as applicable to the case before us. * * *

"*We will first consider the affirmative defence already mentioned; for, if that be found to be true in point of fact, it will preclude any such action by this court as the plaintiff has prayed for.*

"It is to be observed, as preliminary to an examnation of the acts of the general government in the special matter before us, that the whole system of river and lake and harbor improvements, whether on the sea-coast or on the lakes or the great navigable rivers of the interior, has for years been mainly under the control of that government, and that, whenever it has taken charge of the matters, its right to an exclusive control has not been denied. The *operation* of the *government* in this regard have been conducted by the bureau of engineering, as part of the War Department, to which *Congress has confided* the execution of *its wishes* in all these matters. That *department has mapped* out in suitable geographical divisions the work thus imposed upon it, and placed these under the control of officers who are in charge of them. These are again subdivided, so that while the lake system,

or, at all events, the western lake system, is in the charge of one general superintendent, the separate works which at different places are conducted under him have each another engineering officer, who has special charge of those works.

"For many years past, Congress has been in the habit of passing an annual appropriation bill, called the river and harbor bill, devoted to works of this class exclusively; and in these bills it appropriates specific sums to specific works, either already commenced and unfinished, or for new works thereby authorized, or sums necessary for the safety and protection of works already in existence. The money thus appropriated is expended, as we have said, under the direction of the War Department. *It cannot be necessary to say that when a public work of this character has been inaugurated or adopted by Congress, and its management placed under the control of its officers, there exists no right in any other branch of the government to forbid the work, or to prescribe the manner in which it shall be conducted.* * * *

"We do not feel called upon to make an argument to prove that these statutes of the Congress of the United States, and these acts of the Executive Department in carrying those statutes into effect, constitute an adoption of the canal and harbor improvement started by the city of Duluth, and a taking exclusive charge and control of it. *That they amount to the declaration of the Federal Government, that we here interpose and assert our power.* We take upon ourselves the burden of this improvement, which *properly belongs to us*, and that here after this work for the public good is in our hands and subject to our control. * * *

"If, then, Congress, in the exercise of a lawful authority, has adopted and is carrying out a system of harbor improvements at Duluth, this court can have no lawful authority to forbid the work. If that body sees fit to provide a way by which the great commerce of the lakes and the countries

west of them, even to Asia, shall be securely accommodated at the harbor of Duluth by this short canal of three or four hundred feet, can this court decree that it must for ever pursue the old channel, by the natural outlet, over water too shallow for large vessels, unsafe for small ones, and by a longer and much more tedious route?

"When Congress appropriates $10,000 to improve, protect, and secure this *canal*, this court can have no power to require it to be filled up and obstructed. While the engineering officers of the government are, under the authority of Congress, doing all they can to make this canal useful to commerce, and to keep it in good condition, this court can *owe no duty* to a State which requires it to order the City of Duluth to destroy it.

"These views show conclusively that the State of Wisconsin is not *entitled to the relief asked by her bill and that it must, therefore, be dismissed with costs.*"

The Boulder Canyon Project Act confers upon the Secretary of the Interior, powers of discretion and judgment, placing in his hands authority to select the site for the dam. (Bill pages 58, 59, which he has done, Bill page 80.) These powers are as clearly executive and political as those of the Congress are legislative and political; so that, whether the bill of complaint is to be considered from the viewpoint of a lack of jurisdiction on the part of the court over the subject matter of the bill, or from the viewpoint of a failure of the bill to state a cause of action for relief in equity, it is clearly fatally defective.

The question of the jurisdiction of the judicial department of government to interfere with the exercise of discretion on the part of the legislative and executive departments of government found early expres-

sion in the case of Mississippi vs. Johnson, 4 Wall. 475; 71 U. S. 475.

In the syllabus the court said:

> "The President of the United States cannot be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional, nor will a bill having such a purpose be allowed to be filed."

The case involved the distinction between a ministerial duty and one requiring the exercise of discretion. In this case the court clearly makes the distinction and defines the jurisdiction of the court in such cases.

Quoting from the decision:

> "A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law."

Citing Marbury vs. Madison, 1 Cranch 137, and others:

> "In each of these cases, nothing was left to discretion. There was no room for the exercise of judgment. * * *"

Continuing the court said:

> "Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among these laws are the acts named in the bill. * * * The duty thus

imposed on the President is in no sense ministerial. It is purely executive and political."

"An attempt on the part of the judicial department of the government to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshall, as 'an absurd and excessive extravagance.'

"It is true that in the instance before us the interposition of the court is not sought to enforce action by the executive under constitutional legislation, but to restrain such action under *legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of Executive discretion.*"

"The Congress is the legislative department of government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed are, in proper cases, subject to its cognizance."

The motion for leave to file the bill was denied.

The doctrine laid down in this case has been approved and applied in numerous cases. To cite some of the leading ones:

In Gaines vs. Thompson, 74 U. S. 347, 353, the court says:

"Accordingly, in the case of the State of Mississippi, which was an application to this court for the writ of injunction in the exercise of its original jurisdiction, the court says that it is unable to perceive that the fact that the relief asked is by injunction takes the case out of the general principles which forbid judicial interference with the exercise of executive discretion."

To the same purport are 106 U. S, United States vs. Lee, 196, 222; Wisconsin vs. Pelican Ins. Co., 127 U. S. 265, 297. In the case of Taylor vs. Karcheval, 82 Fed. 497, Dist. Ind. 91, the court uses this emphatic language on page 499:

> "It is firmly settled that courts of chancery concern themselves only with matters of property and the maintenance of civil rights. Such courts have no jurisdiction in matters of an *executive* or *political nature;* nor do they interfere with the duties of *any department of the government* except under special circumstances and then only when necessary to the protection of rights of property; nor can they interfere to restrain criminal or immoral acts unless they affect or threaten to invade property rights."

Citing in re Debs 158 U. S. 564; Luetier vs. Borden, 7 Howard 1; Mississippi vs. Johnson, 4 Wall. 475, and others. This case was cited with approval in Anthony vs. Burrow, 129 Fed. 783, 790; American School Healing vs. McAnnually, 102 Fed. 566; Lane vs. Anderson, 67 Fed. 563, 566.

See also State of Louisiana vs. McAdoo, 234 U. S. 627, a recent decision emphasizing the doctrine laid down in 4 Wall. 475.

In the Kodiak 53 Fed. 126, 130, it is said:

> "How then did it happen that he received such orders? *It must be presumed* I think, that they were given in the assertion on the part of this government of territorial jurisdiction over these waters, and if I am correct in this, then it is not the province of courts to participate in the discussion of the questions arising out of this *clause* of *jurisdiction* or *dominion*, for they are of a

political nature, and *not judicial.* National dominion and sovereignty may be extended over the sea as well as over the land, and in our government, *when Congress and the President assert dominion* and sovereignty over any portion of the sea, or over *any body of water,* the *courts are bound by it.*"

ARIZONA DOES NOT COME INTO THIS COURT WITH CLEAN HANDS. BY HER OWN REPRESENTATIONS MADE FOR THE PURPOSE OF INDUCING THE CONGRESS TO TAKE CONTROL FOR THE PURPOSE OF IMPROVING THE NAVIGABILITY OF THE COLORADO RIVER, SHE HAS FOREVER ESTOPPED HERSELF FROM ATTACKING THE CONSTITUTIONALITY OF THE BOULDER CANYON PROJECT ACT ON THE THEORY THAT THE RIVER IS NOT NAVIGABLE.

The doctrine of estoppel and the rules of equity are as applicable to the state and public as to individuals, when the acts of the state in its sovereign capacity by way of commission, omission or a line of conduct warrants the application of the principles of equity. Laches, nor limitation founded on mere delay or the unauthorized acts of its agents apparently within the scope of their authority, do not prevail against the government, but otherwise the doctrine applies with equal, if not with greater force than to private citizens. As was said in 54 Fed. 807, United States vs. Willamette, etc.:

"We actually look to the action of a sovereign state to be characterized by a more scrupulous regard to justice and a higher morality than belong to the ordinary transactions of individuals."

That the doctrine of equitable estoppel has been successfully invoked against both state and national government, is borne out by the numerous decisions of state and federal courts. The most extensive discussion of the subject is found in 191 Fed. 257, State of Iowa vs. Carr, et al. The decision was delivered by Justice Sanborn, Van Devanter and Pollock. That case reviews practically all the previous decisions on the subject and most emphatically reaffirms the doctrine and its applicability. We quote from the syllabi and other parts of the decision.

"9. Estoppel. Equitable Estoppel. Estoppel Against Public.

In a controversy between the rights of a state or nation and those of a citizen, while the state or nation is not barred by mere delay, its rights are measured and adjudicated by the doctrine or estoppel and the other principles and rules of law and equity applicable to the like rights of a citizen under similar circumstances.

"10. Estoppel. Equitable Estoppel. Estoppel Against Public.

The equitable claims of a state or nation appeal to the conscience of a chancellor with the same, but with no greater or less, force than would those of a private citizen, and, barring the effect of mere delay, they are judicable in a court of chancery, to whose jurisdiction the state or nation voluntarily submits them, by every principle and rule of equity applicable to the rights of private citizens under like circumstances.

"11. Estoppel. Equitable Estoppel. Estoppel Against Public. Grounds. Title to Land.

By an avulsion of the Missouri river whatever foundation there ever was to the claim of the state

of Iowa to any land in controversy arose in 1877. It gave no notice of and took no action to enforce any such claim until 1904, when it passed an act to sell abandoned river beds and islands therein to the first applicant, and Hannan immediately applied to buy. The plaintiffs and their grantors had then been in possession of the land in controversy for more than twenty years. During this time the state had levied and collected taxes upon this land as theirs and had acquiesced in their possession, and the plaintiffs and their grantors had paid the taxes and had made costly improvements upon the land.

"Held, there was no equity in the claim of the state and it was estopped from maintaining this claim by these facts. 'Nothing can call a court of equity into activity but conscience, good faith and reasonable diligence.'"

It cites with approval the language of Judge Severens of the Sixth Circuit Court of Appeals, at page 268:

"Following the ancient common-law maxim 'nullum tempus occurrit regi,' it has been settled as the rule here that the United States is not affected in respect to its pursuit of remedies by mere delay or general statutes of limitation. But when it sues in equity as a private suitor on a cause of action relating to its proprietary interests, it is held to be affected by those equities which are recognized as fundamental in controversies between private parties. And why should this not be so? It derogates from the dignity and character of the government to suppose that, formed as it is to secure impartial justice between individuals, it may nevertheless in the conduct of its own affairs, without regard to the principles it represents, perpetrate upon its citizens wrongs which it would promptly condemn if practiced by one of them upon another."

It concludes with these words:

"The state cannot be permitted to say that it has slept during all this long period and abandoned its sovereign duties to its citizens, as well as its reciprocal moral obligations to the government which had made it so magnificent a gift. The state is not to be regarded as a mere machine, incapable of intelligence or conscience. And while it is necessary and right to restrain or annul the unauthorized acts of its agents by which its interests might be impaired, yet there must come a time after long-continued acquiescence in public action with knowledge of it, when, in the interest of its citizens, the state itself shall be precluded from despoiling others by the assertion of its original rights."

A well considered case is found in United States vs. Williamette, etc., 54 Fed. 807:

"The government is not ordinarily bound by an estoppel. While individuals may be estopped by the unauthorized acts of their agents, apparently within the scope of their agency, the sovereign power, being the trustee of the people, is rarely, if ever, bound by the acts of its agents; but, while it is true that for the neglect or the illegal or unauthorized acts of its agents the government should not ordinarily be estopped to show the truth, there is good authority, based upon sound reasoning, to support the doctrine that where the government has *acted by legislative enactment, resolution,* or grant, or otherwise than through the unauthorized or *illegal acts* of its agents, and the parties dealing with the government have relied upon the same, and in good faith have so changed their relation to the subject-matter thereof that it would be inequitable to declare such action or grant illegal, the government will be es-

topped. Com. v. Andre, 3 Pick. 224; Cahn v. Barnes, 7 Sawy. 48, 5 Fed. Rep. 326; State v. Milk, 11 Fed. Rep. 397; Pengra v. Munz, 29 Fed. Rep. 830; *Woodruff v. Trapnall*, 10 How. 190. No good reason can be offered why the United States in dealing with their subjects, should be unaffected by considerations of morality and right which ordinarily bind the conscience. The defense of estoppel stands upon different ground from that of laches. It is held that laches is not imputable to the government upon grounds of public policy. The common-law rule that no lapse of time can bar the right of the king is not only recognized in the United States, but is deemed to be applicable with added reason, from the fact that here property is held, not as by a monarch for personal or private purposes, but in trust for the common welfare; and, where the agencies of the people are so numerous and scattered, the utmost vigilance would not save the public from loss; but, when matter of estoppel arises, the observance of honest dealing may become of higher importance than the preservation of the public domain. It was well said in Woodruff vs. Trapnall (10 How. 190) that we naturally look to the action of a sovereign state to be characterized by a more scrupulous regard to justice and a higher morality than belong to the ordinary transactions of individuals.

"If it is true that the matters involved in this suit were investigated, as set forth in the answer, and the patents were thereafter issued, and the defendants, assuming that such action was a final determination of the question of title, and relying on the same, made the expenditures they claim to have made, the government should be estopped from enforcing the forfeiture. The Supreme Court, in reversing the decree in this case, and remanding the cause, expressly refrained from deciding the questions involved in the controversy but reversed the case, that its merits might be investigated; and I hold it to be in harmony with

the construction thus given by the Supreme Court to the provisions of the act of March 2, 1889, as well as conformable to the general principles of equity that should govern the trial of this and all similar cases, to allow the defendants the benefit of all the defenses here pleaded."

Utah Power & Light Co. vs. United States, the Eighth Circuit Court of Appeals, 230 Fed. 328, on page 342, says:

"Nevertheless, there can be no doubt that situations may be and are presented where *both state and nation* enter courts of equity as suitors under conditions which place them upon an equal footing, in this respect, with the private citizen; that where the relations existing are such as to convey actual knowledge of and acquiescence in asserted claims under conditions which would make the subsequent denial of such claims inequitable, the doctrine of equitable estoppel as distinguished from mere laches may be invoked even against the government. The cases just cited are examples of such, but their doctrine cannot be so far extended as to validate the unauthorized appropriation of the public lands upon the mere ground of occupation and improvements made, the knowledge of which is presumed to be brought home to the government through 'fiscal operations so various, and agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses if the doctrine of laches can be applied to such transactions.' The doctrine of equitable estoppel has no application here."

(Idaho) State vs. Twin Falls Co., 166 Pac. 220, on page 230, the court says:

"Generally the doctrine of equitable estoppel does not apply to the government. 16 Cyc. 780.

There are, however, exceptions to this rule. See U. S. vs. Stinson, 125 Fed. 907, 60 C. C. A. 615; U. S. vs. Williamette Valley et al. (C. C.) 54 Fed. 807. In the Stinson Case the court said:

> "'When the government seeks its rights at the hands of a court, equity requires that the rights of others as well should be protected. Carr v. U. S., 98 U. S. 438, 25 L. Ed. 209. The government may not in conscience ask a court of equity to set on foot an inquiry that, under the circumstances of the case, would be an unfair or inequitable inquiry. The substantial considerations underlying the doctrine of estoppel apply to government as well as to individuals.'

"It is very true that the government should not be affected by the laches of its agent, and this doctrine is covered by the general rule. In a case such as the one under consideration, however, the state may properly be estopped from taking conflicting positions at different times without just reason. 2 Pomeroy on Equity Jurisprudence, § 804, states:

> "'Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who has in good faith relied upon such conduct and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy.'"

In view of the fact that the Circuit Court of Appeals, 191 Fed. 257, supra, cites so many of the author-

ities on this matter, we deem it unnecessary to again review them here.

It will be noticed from the facts and circumstances in these cases that the government acquiesced in the things done by its citizens in some form or other and permitted the citizens to be placed at a disadvantage to their damage and injury. Certainly if a state cannot avail itself of inequitable conduct as between itself and its citizens, a stronger reason suggests that a state cannot avail itself of inequitable and unfair dealing, and bad faith with the national government. We should certainly expect a "more scrupulous regard to justice and a higher morality."

Let us apply to this case the rules of equitable estoppel as herein set out. Let us concede for the sake of argument, that the State of Arizona has well and sufficiently pleaded the question of the non-navigability of the Colorado River as a basis of this suit, and that such an issue would be a material issue, can it be said, in view of its public records, that coming into a court of equity, it will be heard to maintain that action now? Beginning in its territorial days as far back as 1864 and continuously since, year after year exercising its political power, it has memorialized and petitioned Congress to improve the Colorado River *on the ground that it was a navigable river.* By propaganda, by memorials, by agitation, by advertising, by all the influence of its political powers, it has begged, beseeched and implored Congress to improve this river on the ground that it was a navigable stream. (These acts and supplications are found in the appendix of the brief of the Solicitor General in the motion of the Secretary of the Interior.'

The State of Arizona and its predecessor, the terri-

tory, received some of these benefits. Congress appropriated money and authorized bridges to be built over the river on the theory of its being a navigable river (Appendix to Solicitor Generals brief); therefore, can it be doubted that this long persistent, and for years consistent, policy had its effect in inducing Congress to take the action they have in the Boulder Dam Act? The improvement of the navigability of the Colorado River and the conservation of its flood waters, as provided in the Act, is the realization of the dream, prayers and hopes for over sixty years of the State of Arizona. Can it be said now in good conscience, in good faith, in a scrupulous regard for justice and high morality, that the State of Arizona should be permitted to about face, repudiate all its former conduct and now say the river is unnavigable.

Was Arizona during all these sixty years deceitful in its public dealings with the national Congress or is it acting in good faith now? We submit that it does not lie in her mouth at this late date, under all the rules of high morality, to say that the Colorado River is unnavigable. The position of the parties has been changed to the detriment of the United States. Years of investigation by way of surveys, hearings by Congress on the subject and finally expenditure of vast sums of money in initiating the very thing Arizona has been demanding, precludes the complainant from the relief sought.

We are aware of the rule that estoppel is a matter of defense. The reason for the rule is that certain facts must be established first to invoke the rule, but the case before this court requires no such hearing. The public records of the State of Arizona, which they will not deny, are matters of judicial notice. In

the face of these records, we submit that she is shown to be unable to do so and does not come into this court with "clean hands," a defense which is available on motion to dismiss, (Montgomery's Manual, Sec. 91); and that even if the non-navigability of the Colorado River could in fact be made a material issue in such a case as this, the records upon this subject shown in the Solicitor General's Brief, are such as would preclude any allegation by Arizona that said river is a non-navigable stream.

THE BOULDER CANYON PROJECT ACT AND THE SIX STATE COMPACT ARE CONSTITUTIONAL AND VALID.

1. The Boulder Canon Project Act.

The complainant, in instituting this action, has assumed the burden of overcoming the presumption that exists in favor of the constitutional validity of the act and the compact. That burden is stated in Sweet vs. Rechel, 159 U. S. 380,392, in the following language:

> "In determining whether the legislature, in a particular enactment, has passed the limits of its constitutional authority, every reasonable presumption must be indulged in favor of the validity of such enactment. It must be regarded as valid, unless it can be clearly shown to be in conflict with the constitution. It is a well-settled rule of constitutional exposition, that if a statute *may* or *may not be, according to circumstances*, within *the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed.* Talbot vs. Hudson, 16 Gray, 417, 422: Fletcher vs. Peck, 6 Cranch, 87, 128; Sinking Fund Cases, 99 U. S. 700, 718."

In respect of the question whether or not in the enactment of the Boulder Canyon Project Act, Congress "has passed the limits of its constitutional authority" in asserting control over the Colorado River, all that would seem to be necessary for the support of the constitutionality of the act is to quote from Wisconsin vs. Duluth, 96 U. S. 379, 386, 387, wherein it is said:

> "We do not feel called upon to make an argument to prove that these statutes of the Congress of the United States, and these acts of the Executive Department in carrying those statutes into effect, constitute an adoption of the canal and harbor improvement started by the city of Duluth, and a taking exclusive charge and control of it. That they amount to the *declaration* of the Federal government, *that we here interpose and assert our power; we take upon ourselves the burden of this improvement, which properly belongs to us,* and that hereafter this work for the public good is in our hands and subject to our control.
>
> "If the merest recital of these acts of Congress, and of the War Department under them, do not establish that proposition, we can have little hope of making it plain by elaborate argument.
>
> "*Nor can there be any doubt that such action is within the constitutional power of Congress.* It is a power which has been exercised ever since the government was organized under the Constitution. The only question ever raised has been how far and under what circumstances the exercise of the power is *exclusive* of its exercise by the States. And while this court has maintained, in many cases, the right of the States to authorize structures in and over the navigable waters of the States, which may either impede or improve their navigation, in the absence of any action of the general government in the same matter, the doc-

> trine has been laid down with unvarying uniformity, that when Congress has, by *any expression of its will, occupied the field*, that action was *conclusive* of *any right* to the contrary asserted under State authority. The adjudged cases in this court on this point are numerous."

In respect of the proposition which opposing counsel have submitted as the major premise upon which their brief in support of the Bill is based, and in support of which they have cited numerous cases; to wit:—

> "That this Court is not bound by such legislative declarations, but may determine the true purpose of legislation by considering its effect, is well settled." (Arizona's Brief 557.)

but little need be said. The cases support the principle stated, but the principle has not the least application to a state of facts such as is shown by Arizona's Bill of Complaint herein, because:

Each and every of the cases cited had to do with legislative acts upon the face of which it affirmatively appeared, from simple inspection of the Act itself, that the purpose or object clearly intended to be accomplished, was a purely local matter which had been reserved to the States by the 10th Amendment, instead of a matter over which jurisdiction had been granted to Congress by the Constitution, as the Bill shows to be the case herein; or one the accomplishment of which had been otherwise prohibited to Congress by the Constitution.

The first case cited is Hammer vs. Dagenhart, 247 U. S. 251, and is a clear illustration of the principle involved in that case. The thing intended to be accomplished by the statute therein involved was, "the

denial of the facilities of Interstate Commerce to those manufacturers in the States who employed children within the prohibited ages." Concerning this object the court said at page 272:

> "Over interstate transportation, or its incidents, the *regulatory power* of Congress is ample, but the *production* of *articles*, intended for interstate commerce, *is a matter* of *local* regulation," (p. 273-274).
>
> "The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such *commerce*, and *not* to give it authority to *control the States* in their *exercise* of the *police power* over *local trade* and manufacture.
>
> "The grant of authority over a purely Federal matter was not *intended to destroy* the *local power* always existing and carefully *reserved* to the States in the *Tenth Amendment* to the Constitution."

The other cases cited in Arizona's Brief, as did the case above cited, involved an assumption of authority by Congress over a local matter, power over which had not been granted to Congress, but on the contrary had been reserved to the States; or it involved statutes upon the face of which it was apparent that the purpose or object intended to be accomplished thereby was such that, if the statute were carried into effect, its operation would clearly violate and be destructive of rights granted or secured by the Constitution. Minnesota vs. Barber, 136 U. S. 313, 319 cited on page 59 of complainants brief, clearly illustrates this class of cases, and, in so doing, gives specific recognition to the presumption of good faith on the part of Congress in the enactment of statutes as follows:

"The *presumption* that this statute was enacted, in *good faith*, for the *purpose expressed* in the title, namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is *not repugnant* to the Constitution of the United States. *There may be no purpose* upon the part of a legislature to *violate* the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, *by its necessary operation*, be destructive of *rights granted* or *secured* by the Constitution. In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void."

None of the cases so cited, we respectfully submit, have any bearing whatever upon a case such as this, wherein an act of Congress is passed for the declared purpose of exerting a power clearly granted by the Constitution, and the ground of attack against the constitutionality of which is that it "is in *excess* of the *powers granted* to *Congress* by the Constitution," for reasons specified which have to do with nothing else than an alleged conflict of authority between the government of a State and the United States, and wherein, by way of diversion, complainant seeks to defeat the operation of the statute by launching an attack against the motive or purpose of Congress in declaring the purpose for which it is enacted by the use of such language as:

"The *recital* in said Act that the purpose thereof is the improvement of navigation and the reclamation of public land *is* a mere subterfuge and false pretense (Bill, 31)."

With respect to the distinction between the cases cited in complainant's brief, pages 55 to 60, and the

instant case, all that we deem it necessary to do is to call attention to Weber vs. Freed, 239 U. S. 325, 329, 330, and Hamilton vs. Kentucky Distilleries Company, 251 U. S. 146, 161, 162.

2. The Six-State Compact is Constitutional and Valid.

Prior to the time of the formulation and approval of the Colorado River Compact by the Commissioners of the Seven States (including Arizona), Congress had declared its authority and asserted control over the waters of the Colorado River, by the appropriation of monies for its improvement, upon Arizona's own representations and solicitations, as shown on page 40 of the Solicitor General's Brief; and by the enactment of statutes conferring authority for the construction of bridges over the river in which provisions were made for their construction and maintenance in accordance with the provisions of the Act regulating the construction of bridges over navigable waters, as is also shown on page 45 of the Solicitor General's Brief. Therefore, up until the time of the ratification of the Six State Compact and the taking effect of the Boulder Canyon Project Act, the taking effect of which was conditioned upon that ratification, the states through which the river flows had authority to improve, obstruct, use or authorize such use of the waters of the river flowing within their boundaries, as in their discretion they might see fit, in the absence of any assertion of control over the river by Congress.

South Carolina vs. Georgia, 93 U. S. 1, 10.
Illinois Central Railroad vs. Illinois, 146 U. S. 387.
Monongahela Nav. Co. vs. U. S., 148 U. S. 312, 332.

When the Compact was drawn and submitted to Congress for its approval, its consent was the only thing sought, or required, or that could be given, that was not possessed by the States to enable them to bind themselves thereby irrevocably, as shown in our first brief. Had the Congress seen fit simply to have given its unconditioned consent to the Compact without more, no question in respect of the authority of the Seven States to enter into such Compact could have arisen for the simple reason that, Article 1, Section 10 of the Constitution provides for such a procedure, and the subject of the Compact is clearly legal, as shown in our first brief.

But Congress, acting upon the theory that the United States had interests of its own in, and authority for its assertion of control over, the waters of the river, and that it had arid lands of its own to be reclaimed, withheld its consent until, after thorough consideration of the subject, it saw fit to enact the Boulder Canyon Project Act, in Section 13 of which it consented to the Compact, but gave that consent only upon the express conditions, which are contained in Section 4A thereof, which provides that;

> "This act shall not take effect and no authority shall be exercised hereunder and no work shall be begun and no moneys expended on or in connection with the works or structures provided for in this act, and no water rights shall be claimed or initiated hereunder and no steps shall be taken by the United States or by others to initiate or perfect any claims to the use of water pertinent to such works or structures UNLESS and UNTIL (1) the states * * *, etc., shall have ratified the Colorado River Compact mentioned in Sec-

tion 13 hereof and the President, by public proclamation, shall have so declared, or

(2) * * * and further until the state of California, by act of its legislature, shall *agree irrevocably* and *unconditionally* with the United States and for the benefit of the states of Arizona, Colorado, Nevada, New Mexico, Utah and Wyoming, as an express *covenant* and *in consideration* of the passage of this act, that the aggregate annual consumptive use of water, * * * for use in the state of California, including all uses under contracts made under the provisions of this act and all water necessary for the supply of any rights which may now exist shall not exceed, etc."

It is apparent from the above language that the conditions precedent contained therein, upon which the taking effect of the Act was made to depend, constituted nothing less than a counter-proposal or offer on the part of the United States government to authorize the states to enter into the Compact, or in the absence of the ability of all of them to agree, to authorize six of said states, including California, to enter into the said Compact, provided they should conform to and comply with the conditions specified in said Act.

Furthermore, as distinct *inducements* for the states to accept its counter-proposal, the Congress, not only consented that the Boulder Canyon Project Act should be subject to the terms of and controlled by the Colorado River Compact, "in the construction, management, and operation of said reservoir, canals, and other works, and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this Act to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide," (Bill pages 58, 70); but in Section 13 (b) thereof it expressly provided that:

"The rights of the United States in or to *waters* of the Colorado River and its tributaries howsoever claimed or acquired, as well as the rights of those claiming *under* the United States, shall be *subject* to and controlled by said Colorado River compact."

Six States, including California, complied with the foregoing conditions precedent strictly in accordance with their letter and spirit, and thereby forever waived every right which they or any of them had, or otherwise might have had, in and to the waters of said river that would in any way conflict with the terms of the compact, and thereby forever estopped themselves by solemn binding agreement, and by legislative records of their actions, from ever claiming or attempting to assert any rights to the contrary.

But this was not all. In accepting the counter-proposal of Congress, they did so with full knowledge of, and consent to, the fact that they were accepting the definite counter-proposal upon which Congress had made its consent to the Colorado River Compact depend, to wit, that they could agree to the taking effect of said Compact only by complying with the conditions stated in said act, and not otherwise. Consequently new rights became vested in each of said signatory states upon the ratification of the Compact and the declaration of that fact by the President of the United States, by reason of which the Boulder Canyon Project Act automatically became effective; because, by the action of said states and said United States governments, respectively, said Compact became a binding agreement as between the six states, as shown in our first brief, and for the reasons that:

1. The parties to said compact were competent. The United States Constitution authorizes the States to enter into compacts with each other with the consent of Congress, and leaves Congress free to either grant or withhold its consent to such compacts.

2. There was a lawful subject matter for said compact. The States through which the river flows own the beds and waters of navigable interstate rivers, subject only to the ownership of the United States in, and its authority over the waters of such rivers for the purposes of navigation and commerce, as shown by the authorities, Supra; therefore,

3. The compact between the states was based upon valuable considerations, because each of the states had rights in the waters of the Colorado River to surrender in return for the ratification of the compact by the others and for the consent of Congress to the compact; and in the United States, through Congress, not only had a consent which it might either give or withhold, but it had reclaimable lands in the interests of which it had the sovereign power and right to approve the compact upon the conditions which it proposed and the states accepted.

In other words, the states are expressly authorized by the United States constitution to enter into such compacts, with the consent of Congress, and the United States, acting in its sovereign, political capacity, has full power and authority to consent to such compacts upon such conditions as are contained in said act, and in addition thereto, to bind itself by estoppel through the extension of such invitations and inducements as accompanied its conditional consent in this case.

Insofar, therefore, as the six states are concerned, the rights of the respective parties to said compact

became established and vested in virtue of their own agreement in respect of the waters of the Colorado River; and, insofar as the United States is concerned, it forever estopped itself from claiming that said act is not subject to the terms of said compact, or from depriving the states or any of them, of the rights that became vested in them respectively by virtue of their ratification of the compact in accordance with the conditions specified in said act.

In respect of similar invitations and inducements concerning navigable rivers, this Honorable Court has said:

> "This is something more than the mere recognition of an existing fact; it is an invitation to the company to do the work; and when in pursuance to that invitation and under authority given by the state of Pennsylvania the company has constructed the lock and dam, it does not lie in the power of the state nor of the United States to say that such lock and dam are an obstruction and wrongfully there, or that the right to compensation for the use of this improvement by the public does not belong to its owner, the navigation company."

Monongahela Navigation Co. vs. U. S., 148 U. S. 312, 335.
Lewis Blue Point Oyster Co. vs. Brigg, 229 U. S. 69.
U. S. vs. Chandler-Dunbar Co., 229 U. S. 53, 62.

(b) The United States has exercised such authority and is now in possession of the river, dam and reservoir sites, actually executing the Boulder Canyon Project Act, as shown by Arizona's own Bill of Com-

plaint, and she is doing so under constitutional authority to improve the navigability of the river in the exercise of her political powers, as is shown by Arizona's Brief; consequently, whether or not the action of Congress and the Secretary of the Interior are commendable, and whether the Boulder Canyon Project Act is within Constitutional limitations, neither this Honorable Court nor any other Court has any authority or jurisdiction to enjoin the execution thereof for the reasons stated in Mississippi vs. Johnson, 4 Wall. 475; 71 U. S. 475, wherein it is said:

> "It is true that in the instance before us the interposition of the court is not sought to enforce action by the executive under constitutional legislation, but to restrain such action under legislation alleged *to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of Executive discretion.*"
>
> *"The Congress is the legislative department of government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed are, in proper cases, subject to its cognisance.*"

As shown herein before, the foregoing principle has received specific application by this Honorable Court in Wisconsin vs. Duluth, 96 U. S. 379, wherein the facts, in substance, were identical with the facts alleged in paragraphs XX, XXX, XXXI, XXXII, and XXXIII, of the Bill of Complaint herein.

(c) If the Colorado river is in fact a navigable stream, the title of Arizona to the bed and waters

thereof is but a bare, technical title which she holds in trust for the public use and benefit, but, as herein shown, that title is clearly subject to the exclusive authority of Congress for the purposes of navigation.

This subject is discussed in complainant's brief from page 72 to page 80, wherein opposing counsel quote from a number of cases from which they deduce the conclusions that:

> First. "If and wherever navigable, the Colorado River *belongs* to and is owned by the State in which it is situated. The State in its *sovereign capacity* owns the *water in the river*, the bed of the river, and its bank to high water mark. *This is a full proprietary ownership.*" (Arizona's Brief, page 78.)
>
> Second. "Even assuming the Colorado River to be navigable, *the United States does not own it*, and has no right to use it or control it for any purpose, except that of regulating commerce by improving navigation. *Not being the owner*, the United States *cannot*, for any purpose or upon any pretext, sell or dispose of the water in the river or the land under it. The power to *direct or authorize any such use, control, sale or disposal of the water in or the land under the river has not been delegated to Congress by the Constitution of the United States.*" (Arizona's Brief, pages 78-79.)

The argument which the complainant bases upon the foregoing premises is so thoroughly disposed of in United States vs. Chandler-Dunbar Company, 229 U. S. 53, and Illinois Central Railroad Company vs. Illinois, 146 U. S. 387, and in the cases cited by us, *supra*, as to require no attention from us, further than to say that the argument made is *not* aimed at the six

defendant states or the Colorado River Compact, but is confined to an attack upon the authority of the Secretary of the Interior to execute the Boulder Canyon Project Act, which is made subservient to the terms of the Compact. From this argument it is apparent that the complainant does not even contend that it is in any sense subject to any direct injury by reason of the existence of the Compact, or on account of anything done or threatened to be done by the defendant states or any of them.

For the foregoing reasons, we respectfully submit, that:

(a) The six-State Compact is a clearly constitutional and valid compact;

(b) Neither the bill of complaint nor the brief of the complainant either assert anything to the contrary or make any pretence of having alleged any cause of action in which any direct attack is made against, or in which the constitutional validity of the compact is assailed in any respect;

(c) The only apparent reason for having made the six states parties defendant to the bill of complaint is due to the fact that the Boulder Canyon Project Act, for relief against the execution of which an injunction is sought, is, by its terms, made subject to the terms of the compact, and the interest of the states therein give rise to the contention that they are proper parties defendant to this suit.

THE UNITED STATES IS AN INDISPENSIBLE PARTY.

The possession of the Colorado River and the work being prosecuted therein by the Secretary of the Interior are not the possession and work of the Secretary

himself as an individual. The river is the property of the United States for the purpose for which possession has been asserted and the work is being prosecuted.

> "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose they are the *public property of the nation*, and subject to all the requisite legislation of Congress."
>
> U. S. vs. Chandler-Dunbar Co., 229 U. S. 53, 63;
> South Carolina vs. Georgia, 93 U. S. 4, 10;
> Gilman vs. Philadelphia, 3 Wall 7, 124.

Therefore, in his assumption of possession and control over the river, the Secretary is not acting in the capacity of a private citizen of the state, but as a representative agent of the United States government. The suit is, for that reason, in effect one against the United States.

State of Louisiana vs. McAdoo, 234 U. S. 627.

In state of Mississippi vs. Johnson, 4 Wall, 475, 501, it is said:

> "It is true that a state may file an original bill in this court, and it may be true, in some cases, that such a bill may be filed against the United States. But we are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us.
>
> "It has been suggested that the bill contains a

prayer that, if the relief sought cannot be had against Andrew Johnson, as President, it may be granted against Andrew Johnson as a citizen of Tennessee. But it is plain that relief as against the execution of an act of Congress by Andrew Johnson is relief against its execution by the President. A bill praying an injunction against the execution of an act of Congress by the incumbent of the presidential office cannot be received, whether it describes him as President or as a citizen of the state.

"The motion for leave to file the bill is, therefore, denied."

CONCLUSION.

Therefore for the reasons hereinbefore set forth these defendants respectfully submit that the Bill of Complaint be dismissed.

Respectfully submitted,

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CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM 1930.

No. 19 (Original)

STATE OF ARIZONA, *Complainant*

vs.

STATE OF CALIFORNIA, STATE OF NEVADA, STATE OF UTAH, STATE OF NEW MEXICO, STATE OF COLORADO, STATE OF WYOMING, AND RAY LYMAN WILBUR, Secretary of the Interior, *Defendants.*

REPLY BRIEF OF CALIFORNIA.

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REPLY BRIEF OF CALIFORNIA.

MAY IT PLEASE THE COURT:

Briefly supplementing the reply brief of the defendant, Ray Lyman Wilbur, Secretary of the Interior, filed herein by the Honorable, the Solicitor General of the United States, in which reply brief we fully concur, the defendant State of California respectfully submits that the complainant State has not, by her

brief, answered the defendant's objections to her bill of complaint, and in that behalf this defendant more particularly calls to the Court's attention the following points:

GENERAL AUTHORITY OF THE UNITED STATES.

The United States, through the Congress, can act upon any question within its power, as defined by the Constitution, and without the consent of anyone. It may adopt any appropriate means necessary or convenient to bring about the desired and authorized end.

In the case of Tennessee v. Davis, 100 U. S. 257-263, 25 L. Ed. 648-650, the Court said:

> "The United States is a government with authority extending over the whole territory of the Union acting upon the States and the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. *No state government* can exclude it from the exercise of *any authority* conferred upon it by the Constitution, obstruct its authorized officers against its will or withhold from it for a moment the cognizance of any subject which that instrument has committed to it."

Chappell v. United States, 160 U. S. 499-509, 40 L. Ed. 510-513.

Luxton v. North River Bridge Co., 153 U. S. 525, 38 L. Ed. 808.

Kohl et al v. United States, 91 U. S. 367-371.

Shiveley v. Bowlby, 152 U. S. 1, 38 L. Ed. 331.

United States v. Winans, 198 U. S. 371, 49 L. Ed. 1089-1093.

As said by Mr. Chief Justice Marshall, in the celebrated case of McCulloch v. Maryland, 4 Wheat, 316:

> "No trace is to be found in the Constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. • • •
>
> "We cannot doubt, therefore, that Congress has the power to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States holds the territory."

THE DECISION OF CONGRESS IS CONCLUSIVE.

The Congress stated in the Act that, among others, its purpose is to improve navigability and provide for reclamation of public lands. Congress is presumed to have acted with full knowledge of the subject matter and in good faith. Its conclusion is not to be questioned.

United States v. Des Moines Nav. & R. Co., 142 U. S., 510-544.
Chesapeake & Potomac Tel. Co. v. Manning, 186 U. S., 238-245.
Wisconsin v. Duluth, 96 U. S. 379.

THE MEANS WHICH THE CONGRESS MAY ADOPT TO A CONSTITUTIONAL END IS FINAL.

We have seen that the Congress has announced the purpose, by the construction authorized by the Boulder Canyon Project Act, to improve the navi-

gability of the Colorado River and provide for the reclamation of public lands. We do not assume—nor, indeed, can we assume—that the Congress was dishonest in the announcement of this purpose. These are legitimate purposes; therefore, the plan which the Congress adopted is final.

In the matter of Quarles, 158 U. S. 532-535, 39 L. Ed. 1080-1091, this Court, speaking through Mr. Justice Gray, said:

> "The United States are a nation, whose powers of government, legislative, executive and judicial, within the sphere of action confided to it by the Constitution, are supreme and paramount. Every right, created by, arising under or dependent upon the Constitution, may be protected and enforced by such means and in such manner as Congress, in the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object."

McCulloch v. Maryland, 4 Wheat 316.
Logan v. United States, 144 U. S. 263, 36 L. Ed. 429.
Ex-parte Siebold, 100 U. S. 371.
In re Debs, 158 U. S. 564.
Kansas v. Colorado, 206 U. S. 46-88.

Congress has the absolute power to determine what is or is not an obstruction of or an improvement to navigation.

Pennsylvania v. W. & B. Bridge Co., 18 How. 421, 15 L. Ed. 435.
The Clinton Bridge, 10 Wall. 454, 19 L. Ed. 969.

United States v. Chandler-Dunbar Co., 229 U. S. 53, 57 L. Ed. 1063.
Miller v. New York, 109 U. S. 385, 27 L. Ed. 971.
Union Bridge Co. v. United States, 204 U. S. 364, 51 L. Ed. 523.

IMPROVEMENT OF NAVIGATION.

We respectfully maintain that the Colorado River is so notoriously navigable that the Court will take judicial notice of that fact, but even if it be not navigable at all, still the Act will not fail. Congress has declared its intention to improve the navigability of this stream. The commerce clause of the Constitution says nothing about the improvement of the navigability of navigable streams. It refers to the regulation of commerce. Under this clause, the Congress has been sustained in the authorization of the construction of a canal (Wisconsin v. Duluth, 96 U. S. 379). Under it, Congress has been sustained in the authorization of a highway (Indiana v. United States, 148 U. S. 148). Under it, Congress has been sustained in the building of a railroad (Wilson v. Shaw, 204 U. S. 24). If this stream is not now navigable, Congress has authority to make it so. If private property is to be taken or injured, ample authority is given in the Act itself for the exercise of eminent domain (Sec. 1).

QUASI-SOVEREIGN RIGHTS.

The State has a right, in her quasi-sovereign capacity, to sue or defend for the protection of her people, but she must first show that her people or their property are in immediate need of such protection. Until

that is shown, no case or controversy of which the Court will take judicial cognizance is presented. All of the leading cases which the complainant cites to this point are where damage to persons or property is present or imminent. In Georgia v. Tennessee Copper Co., 206 U. S. 230, the damage had continued so long that the defendant actually pleaded, and the Court passed upon, the question of laches. A State can maintain such an action only when there is a wrong to be redressed or a right to be enforced by judicial process (Florida v. Mellon, 273 U. S. 12-16). No such condition prevails here. The complainant, in her brief (p. 8), states:

> "The Boulder Canyon Project Act is unconstitutional and void. The bill of complaint states a cause of action, in alleging an impending threat of infringement by defendant Wilbur, under authority of an unconstitutional enactment * * *".

It is clearly an attempt to have this Court declare an Act unconstitutional—nothing more—an abstract question.

POLITICAL POWER.

It will be observed that the complainant, in her brief, does not claim to own the running water of this stream, nor could she do so. Only such water as may be taken into possession and control, and only while in such possession and control, is subject to ownership. (United States v. Chandler-Dunbar Co., 229 U. S. 53; Kinney on Irrigation and Water Rights, 2d Ed. Sec. 333; Wiel on Water Rights, 3d Ed. Sec. 15). She refers to the "control" of these waters;

in other words, an exercise of the police power, which is another term for the power of government (Mutual Loan Company v. Martell, 222 U. S. 225). It is an exercise of political power.

The right of the United States to exercise control over the Colorado River for improvement of navigation or otherwise is also the exercise of political power (United States v. Chandler-Dunbar Co., *supra;* Louis Blue Point Oyster Co. v. Briggs, 229 U. S. 82-88). It is thus a conflict between the political power of the State and the political power of the Nation.

RECLAMATION OF PUBLIC LANDS.

The complainant, in her brief, states (p. 80):

> "There is nothing in the Act, or in the pleadings, to indicate that there is an acre of land belonging to the United States which can be irrigated by water from the proposed reservoir."

In the bill of complaint (p. 32, par. XXIX), the complainant states:

> "That the reclamation of public land is not the purpose of said Act is evident from the fact that 75 per cent of all land which will, or can be, reclaimed or benefited by the construction of the dam, reservoir, power plant and other works authorized in the Act, or by the storage and delivery of water as in said Act provided, is privately owned land".

If 75 per cent is privately owned, then by clear inference the other 25 per cent, is public. Even if no other direct reclamation works were authorized, the creation of large storage would be a logical first step looking toward such reclamation.

The complainant, in her brief (pp. 86 and 87), refers to the provisions of her Enabling Act and Constitution, wherein certain property rights were reserved to the Nation. One is a provision for the selection of lands along the river by the government for power purposes. This selection was made, including the lands at Black Canyon. The other relates to reclamation and is, in part, as follows:

> "There is hereby reserved to the United States, with full acquiescence of this State, all rights and powers for the carrying out of the provisions by the United States of the Act of Congress entitled" Reclamation Act "to the same extent as if this State had remained a territory.

The complainant, in her brief, tells the Court that she has repealed the section of her Constitution above quoted from. Such attempted repeal, however, is wholly ineffective.

As said by this Court through Mr. Justice Brewer, in considering a similar provision relating to Minnesota in the case of Stearns v. Minnesota; 179 U. S. 223-244:

> "That these provisions of the Enabling Act and the Constitution, in form at least, made a compact between the United States and the State, is evident. In an inquiry as to the validity of such a compact, this distinction must at the outset be noticed. There may be agreements or compacts attempted to be entered into between two States, or between a State and the Nation, in reference to political rights or obligations, and there may be those solely in reference to property belonging to one or the other. That different considerations may underlie the question as to the validity

of these two kinds of compacts or agreements is obvious. It has often been said that a State, admitted into the Union, enters therein in full equality with all the others, and such equality may forbid any agreement or compact limiting or qualifying political rights and obligations; Whereas on the other hand, a mere agreement in reference to property involves no question of equality of States, but only of the power of a State to deal with the Nation or with any other State in reference to such property. The case before us is one involving simply an agreement as to property between a State and the Nation.

"That a State and the Nation are competent to enter into an agreement of such a nature with one another has been affirmed in past decisions of this Court, and that they have been frequently made in the admission of New States, as well as subsequently thereto, is a matter of history."

FLOOD CONTROL.

One of the purposes of the Boulder Canyon Project Act is "controlling the floods * * * and regulating the flow of the Colorado River". The bill of complaint does not allege the non-existence of a flood menace on the lower river and below Black Canyon, or at all. The United States is the owner of nearly 600 square miles of irrigable public lands adjacent to the lower river, and below Black Canyon (Senate Document 142 67th Congress, 2d Session, pp. 13-15, 47-80). The United States has constructed and is the owner of the Laguna Dam, some eighteen miles above the international boundary line between the United States and Mexico.

On January 12, 1907, President Theodore Roosevelt addressed a Special Message to the Congress upon the subject of the then serious flood of the Colorado River, wherein he said in part:

"If the break is not closed before the coming spring flood of 1907, it appears highly probable that all of the property values created in this Valley will be wiped out, including farms and towns, as well as the revenues derived by the Southern Pacific Company. Ultimately the channel will be deepened in the main stream itself up to and beyond the town of Yuma, destroying the homes and farms there, the great railroad bridge, and the Government works at Laguna Dam, above Yuma * * *

"If the river is not put back and permanently maintained in its natural bed, the progressive back cutting in the course of one or two years will extend upstream to Yuma, as before stated, and finally to Laguna Dam, now being built by the Government, thus wiping out millions of dollars of property belonging to the Government and to citizens * * *

"The great Yuma Bridge will go out * * * if the break in the Colorado River is not premanently controlled, the financial loss to the United States will be great."

The United States has inherent power to protect its own property. The United States is the owner of the Laguna Dam; the United States has constructed the Yuma Reclamation Project at a cost of many millions of dollars (Annual Report of the Secretary of the Interior, 1927, p. 272). The United States has constructed and is maintaining extensive levee protective works along the lower river Act of July 3, 1926 (Deficiency), 44 Stat. 857; Act of January 21, 1927 (Rivers and Harbors, 44 Stat. 1021).

As indicated by the Message of President Roosevelt, these works may all be destroyed by flood.

Congress will determine the most appropriate method of protecting Government property. Storage and regulation of the flow of the river is the only means of permanent protection of these properties from floods (Report of Senate Committee on Irrigation and Reclamation, March 20, 1928, Report 592, 70th Congress, 1st Session, p. 20).

FLOOD CONTROL UNDER COMMERCE CLAUSE.

Waiving, for this purpose only, the right of the United States to construct flood control works for the protection of its property and the property of its citizens, we find that in the particular case involved, the United States clearly has the right to construct flood control works under the Commerce Clause (Article 1, Section 8, Part 3).

It will be observed that it is commerce among the several States that Congress is authorized to regulate. This provision has been very definitely applied to navigation, but clearly is not limited to navigation. There are five important lines of interstate commerce crossing the river below Black Canyon. Two of these are transcontinental railroads and three are recognized "Federal Aid" highways (Report of House Committee on Irrigation and Reclamation, March 15, 1928, Report No. 918, p. 22).

It is common knowledge that there is very large freight and passenger traffic moved to and from the Pacific Coast and points east of the Colorado River over these great arteries of commerce. It is obvious that these lines of commerce could be seriously interrupted by flood waters of this river. Indeed, President Roosevelt, in his Message of January 12, 1907,

above quoted from, points out that if the flood is not controlled, the channel would be deepened upstream "destroying * * * the great railroad bridge * * *." Further "The great Yuma bridge will go out * * *."

The President, in his Special Message above referred to, recommended to the Congress the advisability of taking immediate steps to control this river.

CONTROL OF PUBLIC LANDS.

The United States has the absolute power and control of the public lands (Constitution, Article 4, Sec. 3).

First, as a proprietor.

United States v. Midwest Oil Co., 236 U. S. 459-474, 59 L. Ed. 673-681.
Camfield v. United States, 167 U. S. 518, 42 L. Ed. 260.
Gibson v. Chouteau, 13 Wall. 92-99, 20 L. Ed. 534-536.
Light v. United States, 220 U. S. 523-536, 55 L. Ed. 570-574.
Stearns v. Minnesota, 179 U. S. 223.
Kansas v. Colorado, 206 U. S. 46.

Second, as a soverign.

Murphy v. Ramsey, 114 U. S. 15-44.
United States v. Kagama, 118 U. S. 375.
Gibson v. Chouteau, 13 Wall. 92, 20 L. Ed. 534.
Dorr v. United States, 195 U. S. 138.
Boyd v. Nebraska, 143 U. S. 136.

The Congress, then, has full discretion to specify the conditions upon which it will permit these lands to be used.

OBJECTIONS OF COMPLAINANT.

The objection of the complainant to the contracts heretofore made is based solely upon the alleged unconstitutionality of the Act under which they were executed, without showing present or immediately threatened injury to person or property therefrom. Of course, this presents only an abstract question.

Arizona complains:

1. That the Act and the compact are unconstitutional and void.

This, standing alone, presents only an abstract question, which the Court will not consider.

2. That the defendant Wilbur, under the Act, threatens to interfere with her control of running water within the State.

This presents a conflict of political authority—one beyond the jurisdiction of the Court.

3. That she will be adversely affected by the compact.

(a) She is not a party to the compact and is not bound by it.

(b) The Congress agrees that the United States—a separate legal entity—will be bound by the terms of the compact. Certainly, Arizona cannot complain if the United States wants to be bound.

(c) The Congress impresses the use of the public land with the terms of the compact. This is clearly within the absolute discretion of Congress. It is a *privilege* which Arizona seeks to protect, not a *right*.

On none of these even does Arizona show any present or immediately threatened injury.

Several of the points here briefly touched upon are fully developed, with argument and authorities, in

the brief filed by our co-defendant States, to which brief this defendant most respectfully directs the Court's attention.

CONCLUSION.

The bill of complaint clearly does not show any present or immediately threatened injury to person or property. The relief prayed for, therefore, becomes merely an abstract question, and the granting of such relief would not only be the determination of an abstract question, but the determination of political rights as between the State and the Nation.

The motion to dismiss, therefore, should be granted.

Respectfully submitted,

STATE OF CALIFORNIA,

By U. S. WEBB,
Its Attorney General.

W. B. MATHEWS,
CHAS. L. CHILDERS,
Of Counsel for California.

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President Coolidge, Message to Congress, December 6, 1927 43
Report of All-American Canal Board to Secretary of the Interior, July, 1919.....97, 98, 99
Report of American Section of International Water Commission, United States and Mexico (1930) 96, 97

Other Documents and Authorities Cited.

Mormon Settlement in Arizona 99
Encyclopedia Britannica 101
New International Encyclopedia 101
Report of Governor of Arizona, 1894 .....94, 95

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 19, Original.

STATE OF ARIZONA, *Complainant*,

v.

STATE OF CALIFORNIA, STATE OF NEVADA, STATE OF UTAH, STATE OF NEW MEXICO, STATE OF COLORADO, STATE OF WYOMING, AND RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, *Defendants*.

BRIEF OF COMPLAINANT IN OPPOSITION TO MOTIONS TO DISMISS THE BILL OF COMPLAINT.

STATEMENT OF THE CASE.

The case comes before the Court upon a motion by defendant Wilbur and a joint motion by the defendant States (all made on January 12, 1931) to dismiss the bill of complaint, filed herein on October 13, 1930.

The bill alleges that defendant Wilbur is proceeding in violation of the laws of Arizona to build a

dam on the Colorado River at Black Canyon, half of which is to be in Arizona, to store all the waters of the Colorado River flowing in Arizona, to divert these waters from Arizona for consumptive use elsewhere, and to prevent the beneficial consumptive use in Arizona of any of the unappropriated water of the Colorado River now flowing in Arizona; that these acts are done under color of authority of the Boulder Canyon Project Act; that this Act purports to authorize the construction of the dam, the diversion of the water from Arizona and its perpetual use elsewhere.

The bill alleges that the Act also approves and attempts to enforce a so-called interstate compact, ratified by the defendant States but which Arizona has refused to ratify, apportioning the beneficial consumptive uses in perpetuity which may be made from the whole Colorado River System including that great part of the system which is in Arizona; and that the Act directs and requires defendant Wilbur to permit no use of the unappropriated water of the main stream of the Colorado River now flowing in Arizona and to be stored by the said dam and reservoir, except subject to the conditions and reservations contained in said Compact.

The bill further alleges that these acts threaten irreparable injury to Arizona, where there are existing projects licensed by the State to appropriate and put to immediate use great quantities of hitherto unappropriated water, by preventing all use of such water and making great areas of the State forever uninhabitable and unproductive. The bill prays for a decree declaring both Act and Compact unconstitutional and void, and enjoining the defendants from carrying out the provisions of either and from carry-

ing out the provisions of certain contracts for the delivery of water already made by defendant Wilbur.

The geography of the Colorado River and the location of the proposed dam and reservoir are shown on the map opposite page 92 of this brief. The facts relating to both are given in Paragraphs II, III, IV, V, VI, VII, VIII, IX, X, XI, and XXXI of the bill. The Colorado, where it flows within and upon the boundary of Arizona, is not a navigable river.

Arizona is an arid state, where irrigation is necessary for cultivation. The Colorado River System is its greatest natural resource. Of the 240,000 square miles in the drainage basin of that system 103,000 are in Arizona. The Colorado River, after entering Arizona, flows for 292 miles wholly therein. Then for 396 miles the boundary of Arizona is the middle of its channel.[1] Tributaries of the Colorado flow within Arizona for a combined length of 836 miles. The total flow of the system is 18,000,000 acre-feet annually, of which 9,000,000 are appropriated, diverted and consumed within Arizona and the six defendant States. The remaining 9,000,000 acre-feet flow in the main stream of the river in Arizona, and are subject to appropriation in Arizona under its laws but only, within Arizona, upon compliance therewith. There are 2,000,000 acres of land in Arizona not now irrigated, but susceptible of irrigation from the Colorado River. Actual projects have been formed in Arizona for the irrigation of 1,000,000 acres of this land, and permits to appropriate water therefor—4,500,000 acre-feet annually will be required—granted by the State. All of this land will remain

[1] Bill, 4; Arizona Constitution, Article I; California Constitution, Article XXI, Sec. 1; Act of May 5, 1866, Ch. 75, 14 Stat. 43.

waste without irrigation, and irrigation is financially impossible unless the necessary water may be appropriated—that is, put to use and thereby the right to its beneficial consumptive use in perpetuity acquired, subject only to the rights of prior appropriators. (Bill, 4-12.)

The Colorado River Compact—printed in full in the complaint, pages 50-58, and analyzed pages 32-34, *infra*—fixes the total annual appropriations which may be made from the whole Colorado River System and apportions this amount to two areas, called the Upper Basin and the Lower Basin. The Lower Basin includes Arizona and portions of Nevada and California; the Upper Basin, portions of the remaining defendant States. To each basin is apportioned the annual beneficial consumptive use in perpetuity of 7,500,000 acre-feet of water, which must satisfy all existing appropriations as well as all future appropriations. There are existing appropriations totalling 6,500,000 acre-feet annually in the Lower Basin and 2,500,000 acre-feet annually in the Upper Basin. The Upper Basin States agree not to deplete the flow of the main stream at Lee Ferry below 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series. The flow of the system in excess of 15,000,000 acre-feet annually is not apportioned. So far as the Lower Basin States are concerned, they may use, but not appropriate, this unapportioned water, if and when it is available for use, subject to any rights which may be recognized in Mexico, and subject to its apportionment after October 1, 1963. If the satisfaction of recognized Mexican rights reduces the unapportioned water below 1,000,000 acre-feet annually, the Lower

Basin may require the Upper Basin to deliver from its apportionment one-half such amount.

The Act approves this Compact upon its ratification by six of the seven States affected by it. Such ratification has taken place. Arizona has refused to ratify. (Act, Sec. 13; Bill, 19, 26-27.) The Act further provides that all use of the works authorized by it and all use and users of water stored by these works shall observe and be subject to and controlled by the Compact, and that all contracts shall so provide. (Sec. 8.) By Section 5 no person shall have the use or right of use for any purpose of stored water except upon contract made with defendant Wilbur.

The Act authorizes the construction of the largest dam and reservoir in the world at Black Canyon. At least half of the dam and the greater part of the reservoir are to be in Arizona. The dam will store, and defendant Wilbur proposes to store, the entire unappropriated flow of the main stream of the Colorado River. The Act also authorizes the construction of a great canal from the Colorado River to the Imperial Valley of California, and provides that all water delivered there shall be free of charge. The Act authorizes defendant Wilbur, and he has made contracts, to divert stored water from Arizona and sell it for consumption elsewhere. The contracts are for permanent service, subject to the Compact. One such contract calls for the delivery of 1,050,000 acre-feet annually to the water district comprising Los Angeles and its suburbs. The delivery and use of this amount of water will exhaust the beneficial consumptive uses in perpetuity apportioned to the Lower Basin. (Bill, 19, 20, 34, 35.)

The defendant also threatens in his water regula-

tions, in compliance with the Act, to permit no use in Arizona of any unappropriated water now flowing in the main stream of the Colorado within Arizona, all of which he proposes to store, unless the user will agree by contract that his use shall be subject to the Compact—which means that his right to continued beneficial use is terminable at any time, either by subsequent appropriations of apportioned water in the Upper Basin, or by recognized appropriations in Mexico, or, after 1963, by the apportionment of the unapportioned flow of the river system. (Bill, 34, 78.)

Water the use of which is subject to such restrictions cannot be put to beneficial use in Arizona. Land in Arizona is and must be irrigated in large projects, due to the cost of installing diversion dams, canals and distribution works. Such projects cannot be financed unless water may be appropriated and the right to its beneficial consumptive use in perpetuity acquired. Defendant Wilbur threatens to prevent such appropriation and, thereby, all beneficial use in Arizona of water from the main stream of the Colorado River, including the carrying out of the existing projects referred to. (Bill, 9, 10, 38, 39.)

The bill presents a case involving the threatened invasion of the *quasi*-sovereign rights of Arizona in water flowing within her boundaries, by the construction of the dam therein and the diversion for perpetual use elsewhere of water stored and flowing within Arizona, thereby, and by enforcing the Compact, preventing any beneficial use of such water in Arizona.

SUMMARY OF THE ARGUMENT.

This is not a suit against the United States, nor one involving sovereign or property rights of the United States. It is a suit to enjoin an officer of the United States from invading, under color of an unconstitutional enactment, *quasi*-sovereign rights of Arizona.

The bill presents a justiciable case within the jurisdiction of this Court. Arizona has a *quasi*-sovereign interest in all the water and land within its boundaries, which it may protect by suit in this Court. Defendant Wilbur threatens to invade that right and injure Arizona by constructing works within Arizona to dam and permanently divert water flowing in Arizona for use elsewhere, and, by these works and by enforcing the Colorado River Compact, to prevent any beneficial use of Colorado River water now flowing in Arizona and subject to appropriation there. There are existing projects to use great amounts of this water, the execution of which defendant Wilbur is preventing. His acts will cause great areas of Arizona which are susceptible of cultivation to remain forever unproductive and uninhabited.

The statute which authorizes these acts cannot be justified as an exercise of power under the commerce clause to improve navigation. The bill contains well pleaded allegations that the Colorado River is not navigable. The contention that the Court should take judicial notice that the river is navigable is not sound in law, and an analysis of the documents cited by defendant Wilbur shows that it is not sound in fact. Furthermore, the purpose and effect of the Act is not to improve navigation. The Court is not bound by

the recital of purposes in the Act, but may determine the purpose of the Act from its effect. The effect, both of the Compact approved by the Act and of the project authorized by it, is to take out of the river the last half of its natural flow which still remains therein. A river which is non-navigable through lack of water, as is the Colorado, cannot be made navigable by taking out more water.

The statute cannot be justified as an act to reclaim public land. No public land is shown to be reclaimable by water stored in the reservoir or diverted by the canal. No provision is made in the Act for the present reclamation of any public land, and the provisions of the Act and Compact make any future reclamation of public land well nigh impossible.

The Act cannot be sustained as a flood control measure. The prevention of floods is not a federal function save as an improvement of or protection to navigation. Such is not the purpose or effect of this Act. The contention that the purpose of the Act is to protect property of the United States from flood damage, if material, is not sustained by anything in the Act, the pleadings, or the Congressional reports cited by defendant Wilbur.

The Boulder Canyon Project Act is unconstitutional and void. The bill of complaint states a cause of action, in alleging an impending threat of infringement by defendant Wilbur, under authority of an unconstitutional enactment, of *quasi*-sovereign rights of Arizona in water flowing within its boundaries, which unless enjoined will cause irreparable injury to Arizona and its people and for which there is no adequate remedy at law.

The motions to dismiss the bill of complaint should be overruled.

ARGUMENT.

I.

THIS IS NOT A SUIT AGAINST THE UNITED STATES.

Both motions assign as a ground of dismissal that "the bill of complaint does not join the United States, which is an indispensable party to this suit." This ground is not argued or referred to in the brief of Utah and Wyoming nor in that of Colorado, New Mexico and Nevada, but defendant Wilbur argues it in his brief, which California has adopted as its own. (Wilbur Brief, 14-18; California Brief, 4.) Defendant Wilbur and the State of California are contending that this is, in substance and effect, a suit against the United States, and that, since the United States has not consented to be sued, and can not be sued without its consent, the bill must be dismissed.

But this is not a suit against the United States. It is a suit to enjoin an officer of the United States from executing and enforcing an unconstitutional enactment, which, if executed and enforced, will deprive the State of Arizona of its right as a *quasi*-sovereign to regulate and control the appropriation and use of water within the State, and of its right as a land-owner to appropriate such water for use on its own land, and will deprive other land-owners in Arizona of their right to make similar appropriations, and will thereby cause great and irreparable injury to the State and its inhabitants. (Bill, 20-40.)

If such a suit, or any suit to enjoin the enforcement of an unconstitutional act of Congress, is a suit against the United States, it can only be so upon the theory that, in such a case, the United States is guilty

of violating its own Constitution, which is both legally and logically impossible. Officers of the United States may violate its Constitution, but the United States itself is incapable of doing so. That a suit to enjoin such a violation is not a suit against the United States is well established by the decisions of this Court.

In *Philadelphia Co. v. Stimson*, 223 U. S. 605, the Secretary of War had established harbor lines which encroached upon land claimed by the complainant, and was threatening to prosecute the complainant if it proceeded with the construction of a wharf on the land in question, and the complainant sued to enjoin the threatened prosecution, claiming that its constitutional rights would be violated thereby. In the opinion of the Court, delivered by Mr. Justice Hughes, it was said (pp. 619-620):

> "* * * If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. * * * And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. * * * And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred. * * *
>
> "The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do

> the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States."

The same principle was applied in *United States v. Lee*, 106 U. S. 196, 204-222; *Belknap v. Schild*, 161 U. S. 10, 16-18; *Scranton v. Wheeler*, 179 U. S. 141, 152, 153; *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 107-111; *Lane v. Watts*, 234 U. S. 525, 536-540; *Northern Pacific Ry. Co. v. North Dakota*, 250 U. S. 135, 151, 152; and *Payne v. Central Pacific Ry. Co.*, 255 U. S. 228, 238; all of which were suits against officers of the United States, but were held not to be suits against the United States. See also *Little v. Barreme*, 2 Cranch, 170, 177-179; *Noble v. Union River Logging Ry. Co.*, 147 U. S. 165, 171, 172; and *William Cramp & Sons Ship & Engine Building Co. v. International Curtis Marine Turbine Co.*, 246 U. S. 28, 40.

Applying the same principle, this Court has repeatedly held that a suit to enjoin the enforcement of unconstitutional State legislation is not a suit against the State. A leading case on this subject is *Ex parte Young*, 209 U. S. 123, 149-161. In *Truax v. Raich*, 239 U. S. 33, which was a suit to enjoin the enforcement of a State statute, this Court, again speaking through Mr. Justice Hughes, said (p. 37):

> "As the bill is framed upon the theory that the act is unconstitutional, and that the defendants who are public officers concerned with the enforcement of the laws of the State are about to proceed wrongfully to the complainant's injury through interference with his employment, it is established that the suit cannot be regarded

as one against the State. Whatever doubt existed in this class of cases was removed by the decision in *Ex parte Young*, 209 U. S. 123, 155, 161, which has repeatedly been followed. * * *"[1]

In *Public Service Co. v. Corboy*, 250 U. S. 153, 159, the doctrine of *Ex parte Young* was declared to be "elementary", and in *Looney v. Crane Co.*, 245 U. S. 178, 191, the Court said of a contention similar to that now made by defendant Wilbur that "the unsoundness of the contention has been so completely established that we need only refer to the leading authorities."

The cases cited in the Wilbur brief (pp. 14-17) are not in point. In *Morrison v. Work*, 266 U. S. 481, an Indian ward of the United States claimed to be one of the equitable owners of land, the legal title to which was in the United States, and prayed for an injunction to restrain the Secretary of the Interior from administering and disposing of the land in what the complainant said was an unl[illegible] manner. In *Minnesota v. Hitchcock*, 185 U. [illegible]; *Oregon v. Hitchcock*, 202 U. S. 60; *Kansas v. [illegible] States*, 204

[1] Other cases in point are *Osborn v. Bank of United States*, 9 Wheat. 738, 846-859; *Davis v. Gray*, 16 Wall. 203, 220, 221; *Board of Liquidation v. McComb*, 92 U. S. 531, 541; *Virginia Coupon Cases*, 114 U. S. 269, 295-297, 314-316; *Pennoyer v. McConnaughy*, 140 U. S. 1, 9-12; *In re Tyler*, 149 U. S. 164, 190, 191; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 389-392; *Scott v. Donald*, 165 U. S. 107, 112-114; *Smyth v. Ames*, 169 U. S. 466, 518, 519; *Prout v. Starr*, 188 U. S. 537, 542-544; *Gunter v. Atlantic Coast Line R. R. Co.*, 200 U. S. 273, 283, 284; *McNeill v. Southern Ry. Co.*, 202 U. S. 543, 559; *Ludwig v. Western Union Tel. Co.*, 216 U. S. 146, 159; *Western Union Tel. Co. v. Andrews*, 216 U. S. 165, 166; *Herndon v. Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 135, 155; *Hopkins v. Clemson Agricultural College*, 221 U. S. 636, 642-648; *Home Telephone & Tel. Co. v. Los Angeles*, 227 U. S. 278, 282-296; *Harrison v. St. Louis & San Francisco R. R. Co.*, 232 U. S. 318, 332; *Tanner v. Little*, 240 U. S. 369, 374, 375, 380; *Greene v. Louisville & Interurban R. R. Co.*, 244 U. S. 499, 506, 507; and *Louisville & Nashville R. R. Co. v. Greene*, 244 U. S. 522, 529-531.

U. S. 331; *Louisiana v. Garfield*, 211 U. S. 70; and *New Mexico v. Lane*, 243 U. S. 52, the complainant States were seeking to establish their title to land which they claimed had been granted to them by the United States, the sole question being whether the title had passed to the States or remained in the United States. These land cases have no bearing on the question raised here. This is not a controversy over land.

Defendant Wilbur attempts to bring this case within the doctrine of the land cases just referred to, by suggesting in his brief (pp. 14, 17) that the United States is here claiming the right, as a land-owner, to appropriate water of the Colorado River for use on its land, and that Arizona is seeking to prevent the exercise of that right. A sufficient answer to this suggestion is that it has no basis in the pleadings. It does not appear from the bill that the United States is claiming any such right, or that it is seeking to appropriate or use water for any such purpose, or that it has any land on which such water could be used. On the contrary, it appears from the bill (pp. 31, 32, 35) that such is not the purpose of the legislation or of the action here complained of.

In *International Postal Supply Co. v. Bruce*, 194 U. S. 601, the owner of a patent sought to restrain a postmaster from using in his post office cancelling and post-marking machines which the United States had hired for a term not yet expired, and had placed in the post office for the use of the postmaster, and which the complainant claimed were an infringement of his patent. In *Goldberg v. Daniels*, 231 U. S. 218, a mandamus was sought to compel the Secretary of the Navy to deliver a vessel owned by the United

States to one who, in response to advertisement, made the highest bid therefor, but the Court held that the Secretary's discretion was not ended by the receipt and opening of bids. In *Louisiana v. McAdoo*, 234 U. S. 627, a State which operated sugar plantations by its convict labor sought to restrain the Secretary of the Treasury from making what the State said was an illegal reduction in duties collected on Cuban sugar. In *Wells v. Roper*, 246 U. S. 335, an injunction was sought to restrain the Postmaster General from annulling a contract for automobile mail service, the Secretary's action being based upon the supposed authority of the contract itself, and being purely discretionary and within the scope of his duties. In all these cases, the courts were asked to interfere with officers of the United States in the performance of duties imposed upon them by statutes whose validity was not questioned. That is not the situation here.

North Dakota v. Chicago & Northwestern Ry. Co., 257 U. S. 485; *Texas v. Interstate Commerce Commission*, 258 U. S. 158; and *Lambert Run Coal Co. v. Baltimore & Ohio R. R. Co.*, 258 U. S. 377, were suits to enjoin, set aside, annul or suspend orders of the Interstate Commerce Commission. The first two were brought originally in this Court, and the third was brought in a State court. All were dismissed, because not brought in a district court of the United States, as required by Sec. 208 of the Judicial Code, as amended by Act of October 22, 1913 (38 Stat. 219), and because not brought against the United States, as required by Sec. 211 of the Judicial Code. These sections are obviously inapplicable to this case.

Kansas v. Colorado, 185 U. S. 125, was a suit against a State. It was not held to be, nor did any-

one suggest that it was, a suit against the United States. It was held that the acts there complained of, though done by State officers, were the acts of the State, and that it was therefore proper to sue the State and not its officers, because in that case there was no claim that the officers were acting in excess of their authority or under an authority not validly conferred. That claim, not made at all in *Kansas v. Colorado*, is the very foundation of the present suit.

II.

THE BILL PRESENTS A JUSTICIABLE CONTROVERSY WITHIN THE JURISDICTION OF THIS COURT.

The second and third reasons urged for the dismissal of this bill on behalf of defendant Wilbur may be discussed together. They are as follows:

> "2. The proposed acts of the defendants will not invade any vested rights of the complainant or of any of its citizens. Consequently the bill of complaint fails to state a case for equitable relief.
>
> "3. In failing to allege any actual or threatened interference with any existing right of the complainant, the bill of complaint presents only abstract questions which may never arise in any justiciable case or controversy."

In lieu of these grounds, the six defendant States in their motion maintain that:

> "This Honorable Court is without jurisdiction of the subject matter of the bill of complaint, for the reason that the same does not present for

adjudication any case or controversy of which the Court can take judicial cognizance."

Three different points of view in respect of the rights which Arizona asserts and the threatened injury thereto are set forth in the three briefs filed by the defendants.

The Wilbur brief contends that the bill does not allege any threatened interference with "vested" or "existing" rights, and that consequently no case for equitable relief is made out. "Vested" or "existing" rights are apparently considered to be rights to divert and consume water arising from appropriations heretofore made. (Wilbur Brief, 18.) It is also alleged that no interference is shown, actual or threatened, with the right of Arizona or its people to make appropriations in the future from the unappropriated waters of the Colorado River. But the inference is plain that such rights are not "vested" or "existing" and are not entitled to the protection of a court of equity.

Colorado, Nevada and New Mexico contend that the rights asserted by Arizona are "political" rights, and that the issue presented is not one of which this Court can take judicial cognizance. (Colorado Brief, 11-12.)

Utah and Wyoming do not discuss any of these matters but merely assert that they are not necessary or proper parties to this litigation.

It is therefore necessary to state briefly the rights which Arizona asserts are threatened by the acts complained of. It will clarify this discussion to point out first what rights are not claimed to be threatened.

In order that there might be no confusion as to the meaning of the term "to appropriate water," as used

in the bill of complaint, it was defined therein as follows: (Bill, 8)

> "To 'appropriate' water means to take and divert a specified quantity thereof and put it to beneficial use in accordance with the laws of the State where such water is found, and, by so doing, to acquire, under said laws, a vested right to take and divert from the same source, and to use and consume, the same quantity of water annually forever, subject only to the rights of prior appropriators."

Used in this sense, the bill alleges (Bill, 7-8) that prior to June 25, 1929, there had been appropriated in Arizona 3,500,000 acre-feet of water from the Colorado River and its tributaries below Lee Ferry, of which 2,900,000 acre-feet had been appropriated from the Gila River.

Section 5 of the Act provides without exception that no person shall use or be entitled to use the stored waters except by contract with the Secretary and upon payment of charges prescribed by him. The Wilbur brief contends (p. 18) that Section 8 requires this to be read in conjunction with Article VIII of the Compact, and that when so read rights of appropriators acquired prior to the effective date of the Act and Compact are preserved. Whether this is the true meaning of the Act or not, it is not thought that at the present time the intervention of a court of equity is necessary to protect the exercise and enjoyment of these rights, and in the present bill there is no allegation that they are threatened. In so far, therefore, as the Wilbur brief seeks to show that there is no threat of interference with rights of

appropriators in Arizona whose appropriations were made prior to June 25, 1929, it deals with matters not alleged in the bill.

1. The Right of Arizona to Control the Appropriation and Use of Waters Within Its Boundaries, Including the Erection Therein of Storage and Diversion Works, and to Preserve Such Water and the Use Thereof for Its People, Are Rights Which the State May Protect by Suit in This Court.

Water is one of the essential elements necessary to sustain life. It is as fundamental as earth or air. The interest of the State in the preservation and control of these natural elements for the benefit of its people in the present and future arises from its sovereignty, and transcends any title or right of use which the State may have recognized in or secured to individuals within its jurisdiction. Such an interest exists in the States of this Union, and the standing of a State to protect that interest by suit in this Court has been repeatedly recognized.

> "* * * This is a suit by a State for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power. * * *"
>
> (By Mr. Justice Holmes in *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237.)

"It is the State of Kansas which invokes the action of this court, charging that through the action of Colorado a large portion of its territory is threatened with disaster. In this respect it is in no manner evading the provisions of the Eleventh Amendment to the Federal Constitution. It is not acting directly and solely for the benefit of any individual citizen to protect his riparian rights. Beyond its property rights it has an interest as a State in this large tract of land bordering on the Arkansas River. Its prosperity affects the general welfare of the State. The controversy rises, therefore, above a mere question of local private right and involves a matter of state interest, and must be considered from that standpoint. *Georgia v. Tennessee Copper Co.*, decided this day, *post*, p. 230."

(By Mr. Justice Brewer in *Kansas v. Colorado*, 206 U. S. 46, 99; see also the opinion of the Court in the same case overruling the motion to dismiss, 185 U. S. 125, 140-144.)

"* * * But it is recognized that the State as *quasi*-sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. *Kansas v. Colorado*, 185 U. S. 125, 141, 143; S. C., 206 U. S. 46, 99; *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 238. What it may protect by suit in this court from interference in the name of property outside of the State's jurisdiction, one would think that it could protect by statute from interference in the same name within. * * *"

(By Mr. Justice Holmes in *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 355.)

"* * * The ground of the bill is that the statute is an unconstitutional interference with the rights reserved to the States by the Tenth Amendment, and that the Acts of the defendant done and threatened under that authority invade the sovereign right of the State and contravene its will manifested in statutes. The State also alleges a pecuniary interest, as owner of the wild birds within its borders and otherwise, admitted by the Government to be sufficient, but it is enough that the bill is a reasonable and proper means to assert the alleged quasi sovereign rights of a State. * * *"

(By Mr. Justice Holmes in *Missouri v. Holland*, 252 U. S. 416, 431.)

"The State undoubtedly has power, and it is its duty, to control and conserve the use of its water resources for the benefit of all its inhabitants, and the Act of 1907 was passed pursuant to the policy of the State to prevent waste and to economize its water resources. (Citing cases.) The only way the City could acquire the right to take the water of the Delaware River was by grant from the State or by authorized purchase or condemnation from one to whom the right had been granted by the State. (Citing authority.) The power to determine the conditions upon which waters may be so diverted is a legislative function. The State may grant or withhold the privilege as it sees fit. * * *"

(By Mr. Justice Butler in *Trenton v. New Jersey*, 262 U. S. 182, 185.)

"But we need not inquire curiously as to the rights of the State of New York derived from this compact, for, wholly aside from it, and regardless of the precise location of the boundary line, the right of the State to maintain such a suit as is stated in the bill is very clear. The

health, comfort and prosperity of the people of the State and the value of their property being gravely menaced, as it is averred that they are by the proposed action of the defendants, the State is the proper party to represent and defend such rights by resort to the remedy of an original suit in this Court under the provisions of the Constitution of the United States. * * *"

(By Mr. Justice Clarke in *New York v. New Jersey*, 256 U. S. 296, 301-302.)

"The object of the bill is to restrain an individual from doing acts that it is alleged that he has no authority to do and that derogate from the quasi-sovereign authority of the State. There is no question that a bill in equity is a proper remedy and that it may be pursued against the defendant without joining either his superior officers or the United States. (Citing cases.) As the bill was dismissed upon the merits it is not necessary to say more upon this preliminary question. Also the direct appeal to this Court is proper as the State complains of an infringement of its right in the highways and of its other reserved powers and the case as made involves the construction of the Constitution of the United States.

"* * * As the defendant is undertaking to assert exclusive control and to establish a monopoly in a matter as to which, if the allegations of the bill are maintained, the State has not surrendered its legislative power, a cause of action is disclosed if we do not look beyond the bill, and it was wrongly dismissed. * * *"

(By Mr. Justice Holmes in *Colorado v. Toll*, 268 U. S. 228, 230-231.)

Recognizing the vital importance to the welfare and prosperity of the State of waters within its boundaries, Arizona has exercised its sovereign au-

thority over them by statutes which control the building of dams and the use and appropriation of water and forbid any of these acts without its consent. (Bill, 13-14.) Under these statutes and under similar statutes of the defendant States appropriations of water have been made from this river system. The total of such appropriations equals only one-half of its total average annual flow—9,000,000 acre-feet out of 18,000,000 acre-feet. (Bill, 7-8.) The remaining 9,000,000 acre-feet of the average annual flow is unappropriated and all of it flows within the boundaries of Arizona.

The object of the bill is to restrain an individual from doing acts which it is alleged he has no authority to do, and which derogate from the sovereign authority of Arizona over water flowing within its boundaries. This authority extends over all water so flowing, irrespective of whether and to what extent the State has recognized and permitted individual rights to be secured therein. The right of the State is independent of and behind the rights of individuals, and, as here asserted, it involves the control of unappropriated water flowing within its borders, its preservation for the use of its people and the prevention of its diversion and use elsewhere. There can be no question that a bill in equity is the proper remedy to protect this sovereign right of the State. *Kansas v. Colorado*, 206 U. S. 46; *Georgia v. Tennessee Copper Co., supra; Missouri v. Holland, supra; Wyoming v. Colorado*, 259 U. S. 419; *Colorado v. Toll, supra.*

The standing of Arizona to assert such rights of *quasi*-sovereignty in this Court is in no way diminished by the fact that the Colorado River flows within

or upon the borders of other States as well as Arizona. *Kansas v. Colorado, supra; Wyoming v. Colorado, supra; Bean v. Morris*, 221 U. S. 485. In the case last referred to this Court said through Mr. Justice Holmes, on page 486:

> "We know no reason to doubt, and we assume, that, subject to such rights as the lower State might be decided by this court to have, and to vested private rights, if any, protected by the Constitution, the State of Montana has full legislative power over Sage Creek while it flows within that State. *Kansas v. Colorado*, 206 U. S. 46, 93-95. Therefore, subject to the same qualifications, we assume that the concurrence of the laws of Montana with those of Wyoming is necessary to create easements, or such private rights and obligations as are in dispute, across their common boundary line. * * *"

Nor is the standing of Arizona to assert its rights diminished by the fact that, after the river has flowed for 292 miles wholly within the State, it forms the boundary of the State for 396 miles, the dividing line being the middle of the stream. The authority of Arizona within its borders is still paramount, and its obligation to its people to preserve the waters within those borders for the welfare of the State is no less because, in part, the boundary is the middle of the river. Compare *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 700-701.

What has been said above shows clearly that the rights here asserted by Arizona are not political rights beyond the cognizance of this Court, as is asserted by Colorado, Nevada and New Mexico on page 12 of their joint brief.

Georgia v. Stanton, 6 Wall. 50, is an excellent illustration of the assertion of rights purely political. The State in 1867 brought an original bill to enjoin Secretary of War Stanton and Generals Grant and Pope from carrying out the Reconstruction Act. In describing the bill this Court through Mr. Justice Nelson said on page 76:

> "The remaining question on this branch of our inquiry is, whether, in view of the principles above stated, and which we have endeavored to explain, a case is made out in the bill of which this court can take judicial cognizance. In looking into it, it will be seen that we are called upon to restrain the defendants, who represent the executive authority of the government, from carrying into execution certain acts of Congress, inasmuch as such execution would annul, and totally abolish the existing State government of Georgia, and establish another and different one in its place; in other words, would overthrow and destroy the corporate existence of the State, by depriving it of all the means and instrumentalities whereby its existence might, and, otherwise would, be maintained.
>
> "This is the substance of the complaint, and of the relief prayed for. * * *"

This bill, the Court said, called for its judgment "upon political questions", and, upon rights "of a political character". This was clearly so. The interest of the State there involved was not an interest in the control and preservation of natural resources or in the health and welfare of its people, but was solely in the political organization of the State government.

In *Massachusetts v. Mellon*, 262 U. S. 447, also

cited (Colorado Brief, 12) the suit was to enjoin the enforcement of the Maternity Act. The Act provided for appropriations to be divided among such of the States as would accept and comply with the provisions of the Act for the purpose of reducing infant and maternal mortality. The State alleged an infringement of its reserved powers. This Court through Mr. Justice Sutherland said (p. 480):

> "Probably, it would be sufficient to point out that the powers of the State are not invaded, since the statute imposes no obligation but simply extends an option which the State is free to accept or reject. But we do not rest here. * * *
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> * * * * * * * * *
>
> (p. 483)
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> "In the last analysis, the complaint of the plaintiff State is brought to the naked contention that Congress has usurped the reserved powers of the several States by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent; and it is plain that that question, as it is thus presented, is political and not judicial in character, and therefore is not a matter which admits of the exercise of the judicial power.
>
> * * * * * * * * *
>
> (p. 484)
>
> "It follows that in so far as the case depends upon the assertion of a right on the part of the State to sue in its own behalf we are without jurisdiction. In that aspect of the case we are called upon to adjudicate, not rights of person or property, not rights of dominion over physical domain, not quasi-sovereign rights actually invaded or threatened, but abstract questions of political power, of sovereignty, of government. * * *"

Thus the Court clearly differentiated between the rights asserted by Massachusetts and those here asserted by Arizona. Arizona asserts rights of dominion over physical domain which are to be interfered with against her will. Massachusetts asserted merely rights in the machinery of government as such which, in no event, were to be affected without her consent. Such rights were obviously purely political in character.

The remaining cases cited by the three States—*New Jersey v. Sargent*, 269 U. S. 328; *Texas v. Interstate Commerce Commission*, 258 U. S. 158, 162; *Muskrat v. United States*, 219 U. S. 346, 361; and *Stearns v. Wood*, 236 U. S. 75, 78—are not cases where the rights asserted were held to be political rights, but are all cases where mere abstract questions were presented to the Court and abstract declarations of law asked of it. No "cases" or "controversies" existed in which a right of the complainant was shown to be affected prejudicially by any act of the respondent done or threatened. These cases will be considered again in this brief (*infra*, 43) when the injury threatened to Arizona is discussed. They have no bearing upon the nature of the right here asserted. That right has been determined by many decisions of this Court to be an appropriate subject of judicial cognizance.

2. The Bill Alleges the Threat of Immediately Impending Injury to Arizona and Its People From Acts of Defendant Wilbur and Presents a Case to Which the Judicial Power Extends.

This bill does not present abstract questions for the determination of this court, but alleges that the

acts and announced purposes of defendant Wilbur constitute a threat of immediately impending injury to Arizona and its people of the most far reaching and disastrous nature, for which there is no remedy except the injunctive process of this Court.

(a). Defendant Wilbur Threatens to Invade the Quasi-Sovereign Rights of Arizona by Building a Dam Within Its Jurisdiction and Diverting and Using Water from Its Jurisdiction in Violation of Its Laws.

The dam, reservoir and power plant which defendant Wilbur is proceeding to construct are at Black Canyon, and will be partly within the territory of Arizona. Black Canyon is on the Colorado River where it forms the boundary between Arizona and Nevada. (Bill, 4.)

The dam will be 727 feet high above its foundations and will have a storage capacity of 29,500,000 acre-feet of water. (Bill, 33.) A large part of the water stored in this reservoir, if not the largest part, would be stored within the territory of Arizona. The Act also authorizes the construction of a canal to connect the Imperial Valley of California with the Colorado River at Laguna Dam or at some other diversion dam to be constructed.

All the water flowing in the main stream of the river (except such amount, if any, as enters it from the Williams River; see Bill, 5, 8), will be stored in the proposed reservoir for some period of time. The reservoir proposed is large enough to store the entire present flow of the river at Black Canyon for

more than two years.[1] Defendant Wilbur has announced his purpose and intention to sell the use of water stored in this reservoir to generate electrical energy, to sell the water itself for consumptive use, and even to sell water from the river before it reaches the dam. (Bill, 34, 36, 78, 79, 89.) He has already made a so-called contract to deliver 1,050,000 acre-feet of water annually to the Metropolitan Water District of Southern California. (Bill, 34, 35, 79, *et seq.*) He has also made contracts with California corporations, municipal and private, for the delivery of vast quantities of falling water at the dam site for use in generating electrical energy for California. (Bill, 36-37.) Water for the Imperial and Coachella Valleys in California is to be delivered free of charge. All contractees in other States receiving water or its use will acquire rights under their contracts, adverse to the people of Arizona, to the continued use of the water diverted from Arizona and delivered to them.

The laws of Arizona provide that it shall be unlawful to construct within its jurisdiction any dam without the approval of the State given through its engineer. (Bill, 14, 48-50.) They also assert the public interest in all water within the jurisdiction of the State and provide that any person intending to acquire the right to the beneficial use of any water shall first obtain the permission of the State through its water commissioner, in the manner prescribed, and that without such permission the applicant shall

[1] The bill (p. 7) alleges the total average flow of the Colorado River and its tributaries in the United States to be 18,000,000 acre-feet of water annually. Of this 2,900,000 acre-feet flows in the Gila and 2,500,000 is diverted, used and consumed above Lee Ferry. (Bill, 7, 8.) The remainder, 12,600,000 acre-feet, less any flow of the Williams River which reaches the main stream, will be the approximate average annual flow at Black Canyon.

take no steps towards the construction of works or the diversion of water. After obtaining this consent the applicant may proceed to construct works and put water to beneficial use and by so doing acquire under the laws of Arizona the right to take from the same source and use and consume the same quantity of water annually forever, subject only to the rights of prior appropriators. (Bill, 8, 13, 14, 43 *et seq.*)

Obvious and fundamental considerations of preserving and wisely administering the greatest resource of an arid State led to the enactment of these laws. They secure interests of the State in persons and property as vital as any which it has. If the bill stated no more than that acts of this defendant, done and threatened to be done in Arizona under a statute which was an unconstitutional interference with rights reserved to the State, invaded the sovereign rights of the State in the waters within its jurisdiction in contravention of its will manifested in statutes, it would be a reasonable and proper means of asserting the *quasi*-sovereign rights of the State. Such was the ground upon which this Court took jurisdiction in *Missouri v. Holland, supra*, page 20. There the injury presented was an invasion of the *quasi*-sovereign interest of the State in wild birds within its borders.

In *Colorado v. Toll, supra*, page 21, this Court also stated that the bill disclosed a cause of action when it alleged an interference by one without authority with the *quasi*-sovereign interest of the State in its highways. The interest of Arizona in the water of the Colorado River here alleged to be invaded without authority is far more vital than was the interest of Colorado in its highways within a National

Park. So also in *Marshall Dental Manufacturing Co. v. Iowa*, 226 U. S. 460, an invasion of the interest of Iowa in the condition of a lake within its territory by one attempting to drain it without authority, was sufficient without more, to present a case within the jurisdiction of this Court.

Plainly the courts of Arizona would have jurisdiction of a suit to enjoin a defendant within its borders who was proceeding to build a dam therein and to divert water therefrom in contravention of its laws. If that defendant sought to justify his action by an alleged law of the United States this Court would have jurisdiction of an appeal. *Marshall Dental Manufacturing Co. v. Iowa, supra;* compare *Colorado v. Toll, supra; Missouri v. Holland, supra.* Such a case would not present an abstract question but a present and immediate clash of interests—a defendant threatening to perform acts within the jurisdiction of Arizona forbidden by its laws, and Arizona seeking to prevent those acts. This is wholly different from *New Jersey v. Sargent, supra,* or *New York v. Illinois,* 274 U. S. 488, where, among other differences, there was no act done or threatened to be done within the complaining State and no invasion of its sovereignty. If in those cases the defendant had threatened to build a dam and works upon the territory of the complaining States in violation of their laws, it can not be doubted for a moment that a bill would have been a proper method of asserting the *quasi*-sovereign rights of the States. The present bill clearly presents a "case" or "controversy" of which this court has jurisdiction, even if the only injury considered is the building of a dam within and diversion and use of water flowing within the jurisdiction of Arizona.

(b), Defendant Wilbur also Threatens to Prevent Any Use in Arizona of Unappropriated Colorado River Water Now Flowing There, And, at the Same Time, to Deliver Such Water For Use in Other States Under Contracts, Adverse to Arizona, For Permanent Service.

But the injury to Arizona alleged to be threatened by the bill is even more serious than that just considered, for the defendant is also threatening to exclude the people of Arizona from any use of hitherto unappropriated Colorado River water by imposing upon them such terms and conditions as make its use impossible. These terms and conditions are also in violation of the will of Arizona manifested in statutes.

The Act in Section 5 provides that,

> "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

The contracts are to be made by the Secretary of the Interior, are to impose, except upon users in the Imperial and Coachella Valleys in California, such charges as he may determine, and are to provide that all use of water so permitted is subject to the Colorado River Compact. Section 8 (a) of the Act and the defendant's Water Regulations explicitly so require.[1]

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[1] The Water Regulations (Bill, 34, 79) provide:

> "No person shall have or be entitled to have the use for any purpose of the water stored in Boulder Canyon Reservoir except by contract made in pursuance of these regulations. All purchases of water shall be subject to all the terms and provisions of the Colorado River Compact and of the Boulder Canyon Project Act."

See also the Power Regulations, Bill, 96, 109-110.

The Compact in Article II (a) defines the "Colorado River System" as "that portion of the Colorado River *and its tributaries* within the United States of America." It defines the "Lower Basin" so as to include practically all of Arizona. (Bill, 52, 4, 5, 6.) In Article III (a) there is "apportioned *from the Colorado River System* in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist."

The Wilbur brief on pages 9 and 19 totally misconceives and misstates the meaning and effect of the Compact, as is shown by pages 40 and 41 of the Colorado brief. The apportionment of beneficial use of water to the two basins made in Article III of the Compact is not, as the Wilbur brief appears to believe, restricted to uses from the main stream of the Colorado River, but includes, as the Compact specifically states and as the Colorado brief affirms, uses from the whole "Colorado River System" which by definition includes its tributaries. The apportionment to the Lower Basin from the whole river system is by Article III (a) the beneficial consumptive use in perpetuity of 7,500,000 acre-feet of water, which includes all water necessary for the supply of all rights which exist in the Lower Basin upon the whole river system.

The provision in paragraph (d) of Article III that the Upper Basin States will not cause the flow of the river to be depleted below 75,000,000 acre-feet over ten year periods, has, as the Colorado brief, page 41, correctly states, no bearing on the amount of the ap-

portionment to the Lower Basin. This 75,000,000 acre-feet is not apportioned to the Lower Basin. It may not be appropriated in the Lower Basin. Only so much of it may be appropriated as together with existing and future appropriations of water in or from tributaries entering the river below Lee Ferry will total 7,500,000 acre-feet per year. The 75,000,000 acre-feet includes all surplus waters which under paragraph (c) must first bear any Mexican burden, which may not be appropriated, and which are subject to apportionment after 1963. It is fundamental to an understanding of the Compact that the annual beneficial consumptive use in perpetuity of 7,500,000 acre-feet of water apportioned by it to the Lower Basin includes all beneficial consumptive use in perpetuity which may be made from the whole river system, and is not merely an apportionment of such uses in main stream water flowing at Lee Ferry. The agreement not to deplete the flow at Lee Ferry below the specified amount does not mean, and cannot under the plain words of the Compact be construed to mean, that the guaranteed flow is apportioned to the Lower Basin or may be appropriated there. As to this, at least, there can be no shadow of doubt.

Under the Compact, then, the only water of which the right to exclusive beneficial use in perpetuity may be acquired in the Lower Basin is the water apportioned to that basin. Such apportionment is limited to 7,500,000 acre-feet of water per annum by Article III (a). The Colorado brief, page 40, contends that paragraph (b) of Article III operates to increase this apportionment to 8,500,000 for the Lower Basin. This, we submit, is not the case. If it had been intended to apportion

the larger amount, the Compact could easily have said so. The difference in language between paragraphs (a) and (b) is plain, and the difference in meaning is clear. Paragraph (b) does not *apportion in perpetuity*, as does paragraph (a), any beneficial use of water. It is very careful not to do this. It is to be read with paragraph (c) and relates solely to the method of sharing between the basins any future Mexican burden which this Government might recognize. This burden is to be satisfied first out of "surplus" waters, and surplus waters are defined, not as surplus over quantities "apportioned", but as surplus over quantities "*specified* in paragraphs (a) and (b)." Any deficiency remaining is to be borne equally by the two basins. Thus the Lower Basin, which without paragraph (b) might use water in excess of its apportionment without acquiring any exclusive right in perpetuity thereto, is enabled to retain such uses to the extent of 1,000,000 acre-feet per annum against the first incidence of the Mexican burden. Thereafter it is entitled to require the Upper Basin to share from its apportionment equally in the satisfaction of any deficiency. In other words, all that paragraphs (b) and (c) accomplish is to require the Upper Basin to reduce its apportionment in favor of Mexico before the Lower Basin is required to do so, the Lower Basin being entitled to contribute first, to the extent of 1,000,000 acre-feet, water which it may have used but to which it has no exclusive right in perpetuity—that is, water not apportioned to it. The water apportioned is that to which exclusive beneficial use in perpetuity is given in paragraph (a), less any deductions which may have to be recognized as provided in paragraphs (b) and (c).

For the purposes of the present case it makes little difference whether the apportionment to the Lower Basin is 7,500,000 or 8,500,000 acre-feet per annum. The present appropriations of 6,500,000 acre-feet and the threatened delivery of 1,050,000 acre-feet to Los Angeles will exhaust the former, and out of the latter leave only 950,000 acre-feet for the three Lower Basin States. There are immediate needs in Arizona alone of 4,500,000 acre-feet. (Bill, 11-12.) The bill alleges the existence of actual projects to irrigate 1,000,000 acres of land in Arizona not now irrigated but susceptible of irrigation from the Colorado River. This will require the appropriation of 4,500,000 acre-feet of water annually. (Bill, 11-12.) Permits to appropriate this water have been granted by the State.

A mere license to use water subject to subsequent appropriation in or apportionment to other States is of no value in Arizona. In California, where the Secretary will build the diversion dam and canal and furnish the water without charge, it may have value. But in Arizona (Bill, 10), because of the expense of constructing and operating diversion dams, canals and other works necessary for irrigation, irrigable tracts must be combined into large projects operated and administered as a unit and requiring financing on a large scale. This financing is impossible unless water can be appropriated and the right to its beneficial use in perpetuity acquired. Without this right there is no security whatever for the financing.

The vital difference between the appropriation of water under the laws of Arizona and the mere license permitted by the Compact to use water not apportioned to the Lower Basin, seems to have escaped the writer of the Wilbur brief. He says, on page 19:

"If Arizona's contentions are correct, the entire unappropriated flow of the stream is now and will continue until appropriation by others to be subject to appropriation by her citizens without regard to the terms of the Compact to which she is not a party. Until the dam has been built and the right of the State of Arizona or her citizens to make appropriations adequate to her existing needs has been invaded, or is presently threatened, there can be no basis for relief."

The very purpose and effect of the Act and the defendant's water regulations and contract is to prevent the citizens of Arizona from appropriating—*i. e.*, acquiring the right in perpetuity to exclusive beneficial use of—any part of the unappropriated flow of the stream, and to force them to accept from the defendant Wilbur a mere license subject to the terms of the Compact. To say, as do the defendant States (Colorado Brief, 29; Utah Brief, 7-9), that Arizona is not bound by the Compact is a mere sophistry and a most disingenuous one. For it appears that these States wrote the provisions of the Act here shown to be so harmful to Arizona for the very purpose of subjecting her citizens to the Compact. These provisions first appeared in H. R. 9826, 69th Congress. In reporting that bill the House Committee on Irrigation and Reclamation said (House Report 1657, 69th Cong., 2d Sess., p. 10):

"Perhaps half the time of the committee has been occupied in the consideration of this compact, and the bearing of the situation adverted to upon the project.

"Finally there emerged from the extended discussion a plan, which is expressed in the bill, for handling the interstate water-supply situation.

This provides that nothing shall be done under the bill until at least the six-State ratification becomes effective. *Various devices are in the bill to supplement the six-State ratification and protect the upper-basin States, these devices having been worked out and presented by representatives of these States.* The bill gives the essential congressional approval of the compact upon either a six or seven State basis. As has been well said, the bill 'enthrones the Colorado River compact'.

"This arrangement or plan is objected to by certain groups in the State of Arizona, but the committee has felt that in view of the somewhat uncertain conditions in that State and in view of the urgent necessity for flood relief in the lower Colorado, development should not be allowed to further await action by Arizona. The bill places no burden on Arizona that is not placed on each of the other States. Arizona is not required to approve the compact. She can make every use of the river and of the works provided in this bill that any other State can make and under exactly the same requirements as is made on the other States, *namely, the use must be made subject to the terms of the compact.*

* * * * * * * *

"* * * By 'enthroning the Colorado River compact', it assures to the States of Colorado and New Mexico, Utah and Wyoming the water rights so essential to their future." (Italics ours.)

Even without this frank statement it is plain from the Act itself that its purpose and effect is "to enthrone the Compact" and force Arizona and its people, as a condition to any use of the unappropriated flow of the stream, to forego the right to its continued use in perpetuity granted by the laws of

Arizona, and surrender its use to subsequent appropriators in the Upper Basin, in Mexico, or upon a further apportionment made in the future.

From what has been said it is apparent that those provisions of Section 4 (a) of the Act under which California is required to limit its aggregate annual consumptive use of water from the river to 4,400,000 acre-feet of water apportioned to the Lower Basin by Article III (a) plus not more than one-half of surplus waters unapportioned by the Compact, does not lessen the injury threatened to Arizona. All existing uses must be satisfied from the 7,500,000 acre-feet of water apportioned by Article III (a). Arizona has existing uses totalling 3,500,000 acre-feet. An agreement by California to take no more than the entire remaining apportionment can hardly be of value to Arizona. Similarly, since, as we have shown, unapportioned water, or water apportioned to the Upper Basin, can not be put to use in Arizona subject to the Compact, it is of no value that California also agrees to take no more than half of the surplus waters unapportioned by the Compact. These provisions have no effect or tendency to prevent or lessen the injury to Arizona.

(c). It is Not Necessary That the Bill Should Deny Title in the United States to Any Land Necessary for Appropriation of Unappropriated Water In Arizona.

The Wilbur brief contends that the bill does not show the complainant to be entitled to equitable relief because it does not allege that the projects men-

tioned can, apart from the acts of this defendant, be carried out without the use of land belonging to the United States or within the jurisdiction of another State, and that in the absence of such allegations there is no showing that Arizona or its permittees could take any water and so are injured by the threatened acts of the defendant. (Wilbur Brief, 10, 21, 25.)

There are two conclusive answers to such an argument. *First:* The contention is wholly immaterial to the cause of action alleged. *Second:* As a matter of pleading it is not necessary for the complainant in its bill to anticipate and deny matters which the defendant must raise as defenses to the bill.

First: The contention is immaterial. The cause of action alleged is not merely the prevention of appropriations in Arizona without more. It is that the defendant while preventing appropriations in Arizona is diverting water to users outside the State and enabling them to acquire rights adverse to Arizona in water now flowing therein. If the defendant were merely preserving the *status quo*, however unlawfully, he might possibly argue that to show injury Arizona must show power in itself to disturb it. But he is not doing this; he himself is disturbing it. It is immaterial whether Arizona or its permittees could build a reservoir without the consent of the United States. He himself is building one. He is making unappropriated water available for use. He is doing this in Arizona where it is now needed and can be used. He is threatening to divert large quantities for use in California to which users in California will acquire rights adverse to Arizona under contracts with the defendant. He is refusing to release any water

for users in Arizona unless they agree to surrender their right to continued use upon the demand of future users in the Upper Basin and in Mexico, if and when the rights in the latter are recognized. Water cannot be put to use in Arizona under such conditions.

The result of his acts and threatened acts will be to take forever from Arizona and its people all interest and control of water now flowing in Arizona for which there is present need in the form of organized projects approved by the State. It is not open to such an intruder unlawfully interfering with the river to urge that Arizona has not shown that it could appropriate the water without securing the consent of the United States to use its lands.

In *Marshall Dental Manufacturing Co. v. Iowa, supra,* this Court, affirming a decree granting an injunction against the draining of a lake in Iowa, said (p. 461):

> "* * * It follows that the bed of the lake either still belongs to the United States or must be held to have passed to the State.
>
> "The question as to the title to the bed is treated as open in *Hardin v. Shedd,* 190 U. S. 508, 519, and *Whitaker v. McBride,* 197 U. S. 510, 515, and there is no need to decide it now. It is enough to say that by virtue of its sovereignty the State of Iowa has an interest in the condition of the lake sufficient to entitle it to maintain this suit against an intruder without title, whether the State owns the bed or not. This principle has been affirmed and acted upon by the court so recently that it does not require further argument here. (Citing cases.)"

In *Archer v. Greenville Sand and Gravel Co.,* 233 U. S. 60, the defendant without authority was dredging

gravel from the bed of the Mississippi where it belonged to the plaintiff. The Court said (p. 69):

> "Plaintiff owning the land to the middle of the stream, it would seem to follow that she must have such property in its soil as to resist a trespasser upon it, such as the bill alleges the Gravel Company to be. The right, however, is denied, and it is said that she is powerless to prevent the Gravel Company from dredging in front of her land because under the laws of the United States she herself could not do so without permission from the Secretary of War. (Citing the statute.) * * * Whether if she took gravel from the front of her land she would incur the condemnation of this act it is not necessary to decide. She certainly had such an interest in the conditions to prevent one without right from disturbing them. * * *"

In both these cases the question was left open as immaterial whether the complainants could have enjoyed their property without the consent of the United States. The unauthorized acts were none the less an infringement of the complainants' interest in the condition of water or land and could be enjoined. In the present case Arizona has an equally clear and sufficient interest in the water within her territory, of which the defendant, an intruder, threatens to deprive her and her people. It is immaterial whether or not the consent of the United States to use land may be necessary for the enjoyment of the right.

Second: As a matter of pleading the Wilbur brief appears to assume that the sovereignty of Arizona over lands within its boundaries must be affirmatively pleaded to be established. This is the basis of the

argument that the bill is defective because it does *not* allege that the United States does *not* own the dam sites mentioned in paragraphs X and XI of the bill, and the banks of the river. But the contrary is true. The sovereignty of Arizona over these lands is established by the allegation that they are within its jurisdiction. Compare *Georgia v. Tennessee Copper Co., supra,* page 18. If the defendant believes that as to any of these lands there are any limitations upon that sovereignty, it is for him to allege and prove the exception.

The bill alleges that there are dam sites and reservoir sites on the river where it flows wholly in Arizona, which are suitable for the construction of storage dams and reservoirs (Bill, 10); that the projects for irrigation in Arizona (already discussed) contemplate the construction and use of dams at these sites. There is no inference here that any of these sites are on land belonging to the United States. The Wilbur brief blandly states that "where the stream flows through the State of Arizona it flows * * * in national parks and other reservations of the United States". This testimony, however, must be disregarded. There is nothing whatever in the bill which the defendant asks the Court to dismiss upon this ground to warrant such an argument.

The bill also alleges the existence of dam sites and reservoir sites upon the boundary between Nevada and Arizona. These, the Wilbur brief argues, could not be used without the consent of Nevada, "which presumably would not grant consent except in furtherance of the purposes of that Compact". What Nevada would have to gain by imposing the acceptance of the Compact upon Arizona as a condition

to the construction of a dam which could not injure but could only benefit Nevada, does not appear. It is merely presumed that this would be done. There is no basis for the argument whatever. It should be noted that the consent of Nevada to the building of a dam by Arizona is regarded as an essential prerequisite. But the consent of Arizona to the building within its territory of a dam is regarded as entirely unnecessary. The obvious inconsistency is sought to be avoided by the pretext of exercising powers delegated to the Federal Government. But President Coolidge understood and voiced the purely parochial purposes of the dam when he said to Congress:

> "The States which are interested ought to reach mutual agreement. This project (Boulder Dam) is in reality their work. If they wish the Federal Government to undertake it, they should not hesitate to make the necessary concessions to each other."
>
> (Message to Congress, December 6, 1927.)

(*d*). *The Cases Cited by Defendants Which Were Dismissed as Presenting Only Abstract Questions Have Nothing in Common With This Case.*

We have already pointed out (*supra*, 30) fundamental differences between *New York v. Illinois*, *supra*, and *New Jersey v. Sargent*, *supra*, and the present case. In those cases there was no existing clash of interests. The most that appeared from the bills was that if in the future it was desired to develop water power in those States, the acts of Illinois, in the first case, and the Act of Congress, in the second case,

might interfere with such development. And in neither case was the defendant charged with the commission of any act within the complainant State in derogation of its *quasi*-sovereign powers.

The other cases presenting abstract questions have no relevancy here. In *Massachusetts v. Mellon*, already discussed (*supra*, 24, 25), no act complained of could by the terms of the statute itself be performed in Massachusetts without the consent of that State. In *Muskrat v. United States*, *supra*, the very statute under which the suit was brought provided not for any decree or judgment but for a mere advisory opinion. In *Stearns v. Wood*, *supra*, the plaintiff had no interest whatever in the subject matter of the suit. In *Texas v. Interstate Commerce Commission*, *supra*, no law or interest of Texas was shown to be infringed by any act done or threatened to be done. In all of these cases there was no clash of interests, the settlement of which required the exercise of judicial power. The complainants were seeking only a declaration of abstract principle clothed with the authority and prestige of this Court.

There could hardly be a more immediate clash of interests than that presented by this bill, or one which more clearly stated a case or controversy within the cognizance of the judicial power. But it is contended that the prayer of the bill shows that a mere abstract declaration of law is its object, and this because it prays that Act and Compact be declared unconstitutional and void and the defendants enjoined from carrying out any of the provisions of either, or any of the three contracts made pursuant thereto. (Wilbur Brief, 21.) The short answer to this contention is the decree rendered by this Court in *Pennsyl-*

vania v. West Virginia, 262 U. S. 623, 624.[1] If further answer is needed it is that the purpose and effect of the Act is to build the dam in Arizona and "enthrone the Compact" in Arizona as well as in those States which have accepted it. Enough has been said of the immediate threat of injury to Arizona by the attempt to carry out these purposes. There are no other purposes in the statute, nor any lawful acts which can be performed thereunder.

III.

THE BOULDER CANYON PROJECT ACT CANNOT BE JUSTIFIED AS AN EXERCISE OF THE POWER TO REGULATE COMMERCE BY IMPROVING NAVIGATION.

The bill alleges (pp. 6, 7) that the Colorado River is not navigable anywhere within or on the boundaries of Arizona. Despite this allegation, defendant Wilbur and the States of California, Colorado, New Mexico and Nevada attempt to justify the Boulder Canyon Project Act as an exercise of the power to regulate commerce by improving navigation. (Wilbur Brief 2, 11, 13, 23, 26-34; California Brief, 4;

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[1] "These suits having been heretofore submitted on the pleadings and the evidence, and the Court being now fully advised in the premises,

"It is considered, ordered and decreed as follows:

"1. That the Act passed by the Legislature of the defendant State February 10, 1919, which is set forth in the bills of complaint in these suits and known as Chapter 71 of the West Virginia Acts of 1919, is a void and inoperative enactment because it contravenes the limitations which the Constitution of the United States places upon state action in respect of commerce among the several States;

"2. That the defendant State, and her several officers, agents and servants, are hereby severally enjoined from enforcing, or attempting to enforce, that Act;"

Colorado Brief, 7, 9, 10, 15-21.) Utah and Wyoming do not join in this attempt, but admit Arizona's allegation that the Colorado River is not navigable. (Utah Brief, 11.)

1. The Motions to Dismiss Admit Arizona's Allegation That the Colorado River is Not Navigable. This is An Allegation of Fact, Not a Conclusion of Law. If Insufficiently Pleaded, Non-Navigability is Presumed.

Aside from any admission contained in the briefs, the rule is that a demurrer or motion to dismiss admits every well pleaded allegation of fact contained in the bill. *Payne v. Central Pacific Ry. Co.*, 255 U. S. 228, 232. It is also the rule that facts not appearing on the face of the bill cannot be considered in determining a demurrer or motion to dismiss. *Stewart v. Masterson*, 131 U. S. 151, 158.

In the face of these elementary rules of pleading, defendant Wilbur and the States of California, Colorado, New Mexico and Nevada are asking the Court to disregard Arizona's allegation that the Colorado River is not navigable, and to hold, without allegation or proof, that it is in fact a navigable river. They put this request upon the ground that the allegation of non-navigability is not an allegation of fact, but a mere conclusion of law. (Wilbur Brief, 27-29; California Brief, 4; Colorado Brief, 16-20.)

The Wilbur brief cites no authorities in support of this contention, and those cited in the Colorado brief (pp. 17, 18) do not in fact support it. No question of the sufficiency or insufficiency of an allegation of navigability or non-navigability was involved in

any of the cited cases.[1] Questions of navigability were involved in *The Daniel Ball*, 10 Wall. 557; *The Montello*, 20 Wall. 430; *St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners*, 168 U. S. 349; and *Economy Light & Power Co. v. United States*, 256 U. S. 113, but in each case the question was treated as a question of fact, and, without exception, it has been so treated whenever it has arisen in this Court.[2]

Counsel for Colorado, New Mexico and Nevada have also cited *Walker v. Allen*, 72 Ala. 456, wherein the court reversed a decree overruling demurrers to a bill brought to enjoin the construction of a boom across a stream in Alabama. But counsel apparently have failed to observe that the allegation there held insufficient was an allegation of navigability, not of non-navigability. The Alabama Court said (p. 458):

> "• • • All tidal streams are, prima facie, public and navigable; all streams above-tide-water, if in the survey of the public lands by the United States they have not been treated as navigable, fractional sections made upon their margin, and the bed reserved from grant or sale, are prima facie private—not navigable, and 'not subject to a public right of floatage upon them.' Upon the party claiming for such streams the

[1] No question of navigability or non-navigability was involved in *United States v. Des Moines Navigation & Ry. Co.*, 142 U. S. 510; *United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53; *Western Union Tel. Co. v. Inman & I. S. S. Co.*, 48 Fed. 85; *Dennison Mfg. Co. v. Thomas Mfg. Co.*, 94 Fed. 651; *Hubbard v. Fort*, 186 Fed. 987; or *The Steam Dredge No. 6*, 222 Fed. 576.

[2] See, in addition to cases cited *supra*, *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 696-699; *Leovy v. United States*, 177 U. S. 621, 627-635; *Donnelly v. United States*, 228 U. S. 708, 709; *Oklahoma v. Texas*, 258 U. S. 574, 586; *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U. S. 77, 86; *United States v. Holt State Bank*, 270 U. S. 49, 56, 57.

character of public and navigable, rests the onus probandi, and the duty of stating the facts from which the court can draw the conclusion that the stream of water is of the character claimed for it."

It should be observed that, at all points within and on the boundaries of Arizona, the Colorado River is a non-tidal stream (Bill, 6), and therefore within the doctrine of the Alabama case. This doctrine is not peculiar to Alabama. Rivers not known to be navigable are generally presumed to be non-navigable, and whoever asserts their navigability has the burden of proof.[1]

It thus becomes unnecessary to consider whether in this case the non-navigability of the Colorado River has been sufficiently pleaded, since, if insufficiently pleaded, it will be presumed.

2. The Court Cannot Properly Take Judicial Notice that the Colorado River is Navigable.

It is further contended by defendant Wilbur and the States of California, Colorado, New Mexico and Nevada that this Court should take judicial notice that the Colorado River is navigable, and should for that reason disregard Arizona's allegation that it is not navigable. (Wilbur Brief, 2, 13, 29-34; California Brief, 4; Colorado Brief, 20.) The substance of their contention is that navigability and non-navigability are mere facts of geography, which every court is bound to know judicially, and as to which no issue can be raised, no evidence heard.

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[1] *Harrison v. Fite*, 148 Fed. 781, 785; *Minter v. North American Dredging Co.*, 242 Fed. 553, 559; *Lehy v. Ashland Lumbering Co.*, 49 Wis. 165, 169. Compare *Oklahoma v. Texas*, 256 U. S. 574, 589.

This contention is not sustained by the cases which have been cited for that purpose.[1] *The Montello*, 11 Wall. 411, cited at page 30 of the Wilbur brief, had to do with the Fox River between Oshkosh and Portage City, within the State of Wisconsin. There was no question as to the navigability of that part of the river. It was not only navigable, but was actually being navigated. The question was whether the water so navigated was a navigable water of the United States. This Court was unable to decide that question, because the record did not show, and the Court did not know, judicially or otherwise, whether the Fox River, by itself or by its connection with other waters, formed a highway over which interstate or foreign commerce was or might be carried on. In other words, the Court did not know and could not ascertain from the record how much of the Fox River was navigable, or which, if any, of its tributaries were navigable. The case was remanded for further proceedings, the Court stating (p. 415):

> "* * * the parties will be able to present, by new allegations and evidence, the precise character of Fox River as a navigable stream * * *"

That was done, and when the case came again before this Court (20 Wall. 430) it was decided upon

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[1] No question of navigability was involved in *The Planter*, 7 Pet. 324; *Brown v. Piper*, 91 U. S. 37; *Jones v. United States*, 137 U. S. 202; *Brown v. Spilman*, 155 U. S. 665; *United States v. Thornton*, 160 U. S. 654; *Louisville Trust Co. v. Louisville, New Albany & Chicago Ry. Co.*, 174 U. S. 674; *Pearoy v. Stranahan*, 205 U. S. 257; *Muller v. Oregon*, 208 U. S. 412; *Cubbins v. Mississippi River Commission*, 241 U. S. 351; *Carroll v. United States*, 267 U. S. 132; *Middlesex Transportation Co. v. Pennsylvania R. R. Co.*, 82 N. J. Eq. 550; *Heiskell v. Knox County*, 132 Tenn. 180; or *McSween v. State Live Stock Board*, 97 Fla. 750.

the evidence. In *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, cited at page 30 of the Wilbur brief, the opinion, delivered by Mr. Justice Brewer, was in part as follows (p. 697):

"* * * In *The Montello*, 11 Wall. 411-414, it was observed: 'We are supposed to know judicially the principal features of the geography of our country, and, as a part of it, what streams are public navigable waters of the United States.' But the force of this general statement is qualified by the declaration at the close of the opinion: 'As the decree must be reversed and the cause remanded to the court below for further proceedings, the parties will be able to present, by new allegations and evidence, the precise character of Fox River as a navigable stream, and not leave the matter to be inferred by construction from an imperfect pleading.'

* * * * * * * *

"It is reasonable that the courts take judicial notice that certain rivers are navigable and others not, for these are matters of general knowledge. But it is not so clear that it can fairly be said, in respect to a river known to be navigable, that it is, or ought to be, a matter of common knowledge at what particular place between its mouth and its source navigability ceases. And so it may well be doubted whether the courts will take judicial notice of that fact. It would seem that such a matter was one requiring evidence, and to be determined by proof. That the Rio Grande, speaking generally, is a navigable river is clearly shown by the affidavits. It is also a matter of common knowledge, and therefore the courts may properly take judicial notice of that fact. But how many know how far up the stream navigability extends? Can it be said to be a matter of general knowledge, or

one that ought to be generally known? If not, it should be determined by evidence. * * *"

In *Economy Light & Power Co. v. United States*, 256 U. S. 113, cited at page 31 of the Wilbur brief, the United States sued to enjoin the construction of a dam in the Des Plaines River, alleging it to be a navigable water of the United States. The defendant denied that the river was navigable. On this question of navigability a large amount of evidence was taken, the abstract containing 3,186 printed pages. (256 Fed. 792, 793.) On this evidence the District Court, the Circuit Court of Appeals and this Court held the river to be navigable. No question of judicial notice was involved.

Instead of sustaining the contention in support of which they were cited, these cases establish the proposition that courts do not take judicial notice of the navigability of a stream, unless its navigability is a matter of common knowledge and free from doubt. Other cases enunciate the same doctrine. For example, in *Donnelly v. United States*, 228 U. S. 243, 708, the Court was asked to take judicial notice of the alleged navigability of the Klamath River at a point in California where a homicide had been committed. There was a California statute which, in effect, declared that the river was not navigable. Mr. Justice Pitney, who delivered the opinion, said (p. 709):

"* * * It is conceded that whether the Klamath is navigable at the place where the homicide occurred is a question of fact. Of course the tide ebbs and flows at the river's mouth, but the *locus in quo* is approximately twenty-five miles from

the mouth, and quite beyond any possible influence of the tide. As the opinion points out, there was evidence tending to show that the stream is navigable in fact at certain seasons from Requa (near its mouth) up to and above the *locus in quo*. But the evidence was by no means conclusive. It showed an apparently irregular traffic, in times of high water only, employing Indian canoes, 'dug-outs,' and at certain times small steamboats and gasoline launches. In this state of the evidence, the trial court could not, nor can we, take judicial notice of the stream as being navigable in fact; especially in the face of a declaration by the legislature of the State that it is not navigable. * * *"

A question of navigability was involved in *The Daniel Ball*, 10 Wall. 557, 561, but it was decided on the facts stipulated by the parties, not on facts judicially noticed. Similar questions were involved in *St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners*, 168 U. S. 349, 359; *Leovy v. United States*, 177 U. S. 621, 627, 635, 637; *Oklahoma v. Texas*, 258 U. S. 574, 590, 591; *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U. S. 77, 86; and *United States v. Holt State Bank*, 270 U. S. 49, 56, 57, and in each case the question was decided on evidence. In none of these cases did the Court assume to know judicially that the stream in question was or was not navigable. Indeed we know of no instance and counsel for defendants have cited none, in which this Court has ever decided a disputed question of navigability by judicial knowledge or notice, unaided by evidence.

In *United States v. Utah*, 279 U. S. 816, still pending in this court (No. 14, Original, October Term,

1930), the sole question of fact was and is whether certain portions of the Colorado, Green and San Juan Rivers within the State of Utah are navigable, their non-navigability being alleged by the United States and denied by the State. Instead of taking judicial notice of the facts and deciding the case on that basis, the Court appointed a Special Master to take the evidence and report it to the Court, with his findings of fact, conclusions of law and recommendations for a decree. Pursuant to the Court's order, the Special Master held 31 public hearings, at which the parties and their counsel appeared and presented their evidence, consisting of 670 exhibits and the testimony of 171 witnesses, covering 5,536 typewritten pages, and reported it to the Court, with his findings of fact, conclusions of law and recommendations for a decree, on October 15, 1930. (Special Master's Report, pages 1-3.) Was this a vain and useless performance? If not, defendant Wilbur and the States of California, Colorado, New Mexico and Nevada must be wrong in their contention that the Court should now take judicial notice of the supposed navigability of the Colorado River.

The documents referred to in Appendix A of the Wilbur brief (pp. 39-46) are, properly speaking, not before the Court, but even if they were, they would not warrant a finding, nor would they enable the Court to know judicially, that the Colorado River is navigable. These and other documents on the same subject are discussed in the Appendix hereto (pp. 93-103).

3. The Court is Not Bound by the Declaration of Purposes Contained in the Act, But May Determine Its Real Purpose by Considering Its Effect.

Even if the Colorado River were conceded to be navigable, it would still be necessary to inquire whether improvement of navigation is the purpose of the Boulder Canyon Project Act. The Act contains a recital that improvement of navigation is one of its purposes (Bill, 58), but the bill alleges that this is a mere subterfuge and false pretense. (Bill, 31.)

Defendant Wilbur and the States of California, Colorado, New Mexico and Nevada are asking the Court to disregard this allegation and to accept without question the declaration of purposes contained in the Act. (Wilbur Brief, 33; California Brief, 4; Colorado Brief, 15, 16, 20, 21.) Defendant Wilbur and the State of California offer no reason for their suggestion that this allegation be disregarded, but Colorado, New Mexico and Nevada put their request upon the ground that Arizona is thereby attempting to question the "motives" of Congress. (Colorado Brief, 15, 20.)

Arizona is attempting no such thing. The allegation in question is aimed, not at the motives of Congress, but at the purpose and effect of the Act. The motives of Congress are nowhere mentioned or referred to. It is true, as said in *Smith v. Kansas City Title & Trust Co.*, 255 U. S. 180, 210 (Colorado Brief, 20), that when Congress acts within the limits of its constitutional authority, it is not the province of the judicial branch of the Government to question its motives, but it does not follow, nor is it true, that when Congress has exceeded the limits of its constitutional authority, it may avoid judicial inquiry

into the validity of its act by inserting therein a false declaration of purposes. State legislatures are likewise presumed to act with full knowledge and in good faith, as was held in *United States v. Des Moines Navigation & Ry. Co.*, 142 U. S. 510, 544, and *Atchison, Topeka & Santa Fe R. R. Co. v. Matthews*, 174 U. S. 96, 104 (Colorado Brief, 21), but this does not preclude an inquiry as to whether the declared purpose of legislation is its true purpose.

That this Court is not bound by such legislative declarations, but may determine the true purpose of legislation by considering its effect, is well settled. In *Hammer v. Dagenhart*, 247 U. S. 251, an act of Congress prohibiting transportation in interstate commerce of the products of child labor was held unconstitutional. The act purported to be (as the Boulder Canyon Project Act purports to be) a regulation of commerce, but the Court looked beyond the declared purpose of the act and, speaking through Mr. Justice Day, said (p. 271):

> "* * * The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the States who employ children within the prohibited ages. The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States. * * *"

(p. 272)

> "Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation."

(p. 273-274)

"The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture.

"The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution."

In *Child Labor Tax Case*, 259 U. S. 20, the Child Labor Tax Law (incorporated in a revenue act) was held unconstitutional. The act imposed what purported to be a tax on the employment of child labor. This Court, however, looked beyond the declared purpose and, speaking through Chief Justice Taft, said (p. 39) that, in reality,

"* * * the so-called tax is a penalty to coerce people of a State to act as Congress wishes them to act in respect to a matter completely the business of the State Government under the Federal Constitution. * * *"

As to the validity of the so-called tax, the Chief Justice said (p. 38):

"* * * Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon depar-

tures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States."

The same disastrous consequences must result from giving to the word "navigation" the magic which the defendants in this case are claiming for it.

In *Hill v. Wallace*, 259 U. S. 44, an act of Congress known as the Future Trading Act was held unconstitutional. The act imposed what purported to be a tax of 20 cents a bushel on all contracts for the sale of grain for future delivery. This Court looked beyond the declared purpose of the act, and, again speaking through Chief Justice Taft, said (p. 66):

> "It is impossible to escape the conviction, from a full reading of this law, that it was enacted for the purpose of regulating the conduct of business of boards of trade through supervision of the Secretary of Agriculture and the use of an administrative tribunal consisting of that Secretary, the Secretary of Commerce, and the Attorney General. * * * The manifest purpose of the tax is to compel boards of trade to comply with regulations, many of which can have no relevancy to the collection of the tax at all. * * * The act is in essence and on its face a complete regulation of boards of trade, with a penalty of 20 cents a bushel on all 'futures' to coerce boards of trade and their members into compliance. * * *"

In *Linder v. United States*, 268 U. S. 5, in reversing a conviction under the Narcotic Law, the Court, by Mr. Justice McReynolds, spoke of the necessity of construing the law so as to avoid grave

doubts as to its constitutionality, and pointed out (p. 17) that the declared object of the law was to provide revenue, and that its provisions must be interpreted and applied in the light of the principle that

> "* * * Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced. * * *"

This Court has applied the same principle to State legislation.

> "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and if it is apparent that the object of this statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore, and landed at the port of New York, it is as much a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the *Passenger Cases.*"
>
> (By Mr. Justice Miller in *Henderson v. Mayor of New York*, 92 U. S. 259, 268.)

> "A State cannot make a law designed to raise money to support paupers, to detect or pre-

vent crime, to guard against disease, and to cure the sick, an inspection law, within the constitutional meaning of that word, by calling it so in the title."

(By Mr. Justice Miller in *People v. Compagnie Generale Transatlantique*, 107 U. S. 59, 63.)

"* * * The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

(By Mr. Justice Harlan in *Mugler v. Kansas*, 123 U. S. 623, 661.)

"The presumption that this statute was enacted, in good faith, for the purpose expressed in the title, namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not repugnant to the Constitution of the United States. There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void. * * *"

(By Mr. Justice Harlan in *Minnesota v. Barber*, 136 U. S. 313, 319.)

"One challenging the validity of a state enactment on the ground that it is repugnant to the commerce clause is not necessarily bound by the legislative declarations of purpose. It is open to him to show that in their practical operation its provisions directly burden or destroy interstate commerce. * * *"

(By Mr. Justice Butler in *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1, 10.)

We submit, therefore, that this Court is not bound by the declaration of purposes contained in the Boulder Canyon Project Act, but may determine its real purpose by considering its effect.

4. By This Act Congress Has Attempted to Exercise Control of the Colorado River and Its Tributaries, Not for the Improvement of Navigation, but for Other Purposes, the Accomplishment of Which Would, if the River Were Navigable, Destroy Its Navigability.

By this Act Congress has asserted and attempted to exercise supreme and exclusive control of the Colorado River and its tributaries in two ways: First, by approving and attempting to execute and enforce the Colorado River Compact, and second, by providing for the construction, maintenance and operation of a project consisting of a dam, reservoir, power plant, canal and other incidental works and structures. These two parts of the Act (the Compact part and the project part) constitute the whole of it. An examination of the Act will show that neither part of it has any purpose or tendency to improve navigation, but that if there were any navigation, and if it were at all affected by the Act, it would be affected adversely.

(a). *The Compact.*

The Compact, which the Act approves and attempts to enforce, deals with two kinds of water—that which has been appropriated and that which remains unappropriated. As to the first, the Compact provides in Article VIII (Bill, 56):

> "Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this Compact."

By approving and attempting to enforce the Compact, Congress has recognized and undertaken to protect these "present perfected rights." (Bill 70, 71, 74-76.) They are expressly recognized by Section 6 of the Act. (Bill, 68.) The rights thus recognized and protected are the rights of water users in the Upper and Lower Basins to divert and consume annually 9,000,000 acre-feet of water, which is one-half of the total average annual flow of the Colorado River System. (Bill, 7.) Of this 9,000,000 acre-feet of appropriated water the Upper Basin has appropriated and is using 2,500,000 acre-feet and the Lower Basin 6,500,000 acre-feet annually. (Bill, 7.)

By the diversion of this water and the creation of these "present perfected rights," the Colorado River, if it ever was navigable (which Arizona denies), has lost what little navigability it once possessed. The documents referred to in Appendix A of the Wilbur brief (pp. 39-46) and in the Appendix to this brief (pp. 93-103) show conclusively that even in the '60s and '70s of the last century, before any appreciable quantity of water had been diverted from the river, the one great and (even then) insuperable obstacle

to its navigation was lack of water. They further show that as diversions increased and present rights became perfected, even the slight (so-called) navigation which once existed on the river disappeared. That its disappearance was caused, in part at least, by the diversion and consumption of this 9,000,000 acre-feet of water cannot be doubted. Does the Act provide that the water thus lost to navigation shall be restored? On the contrary, by approving the Compact, it provides, in effect, that the loss shall be made perpetual.

As to water not yet appropriated, the Compact (which the Act approves and attempts to enforce) provides, in effect, that each Basin may increase its present consumptive use of water in perpetuity until each has reached a total of 7,500,000 acre-feet. (Bill, 52.) This means that the Upper Basin may add 5,000,000 acre-feet and the Lower Basin 1,000,000 acre-feet annually to present consumptive uses in perpetuity. (Bill, 7.) The Compact also provides that the Lower Basin may further increase its consumptive use of water (but not in perpetuity) by an additional 1,000,000 acre-feet annually. (Bill, 53.) Deducting these amounts from the total annual flow of 18,000,000 acre-feet (Bill 7), there remains 2,000,000 acre-feet of unapportioned water from which any rights accorded Mexico are to be satisfied. (Bill, 53). By the terms of the Compact, any part of this 2,000,000 acre-feet not required by Mexico shall (together with the 1,000,000 acre-feet temporarily awarded to the Lower Basin) be subject to apportionment between the two Basins in 1963, or at any time thereafter.

Thus the Compact and the Act clearly contem-

plate that eventually all the water of the Colorado River System will be diverted and used consumptively, and not for navigation. It is no answer to say that the water will be used for navigation first, and afterwards taken out and used consumptively. At least one-half of it is to be used in the Upper Basin, hundreds of miles above the site of the proposed dam and reservoir. By the Compact, which the Act approves, the Upper Basin is given the lion's share (five-sixths) of the apportioned water now remaining unappropriated. Whatever excuse or justification there may have been for thus favoring the Upper Basin, it cannot be pretended that improvement of navigation was thereby aimed at or accomplished.

Instead of being designed to improve navigation, the Compact was drawn with the unmistakable intention of dedicating the river to uses inconsistent with navigation. This is not a mere speculation, but appears from the express language of the Compact. Paragraph (a) of Article IV of the Compact provides (Bill, 54):

> "Inasmuch as the Colorado River has ceased to be navigable for commerce and the reservation of its waters for navigation would seriously limit the development of its basin, the use of its waters for purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural, and power purposes. If the Congress shall not consent to this paragraph, the other provisions of this compact shall nevertheless remain binding."

The reason for this paragraph was stated by the then Secretary of Commerce, Honorable Herbert

Hoover, Federal representative on and Chairman of the Colorado River Commission, who said in his report transmitting the Compact to Congress (House Doc. 605, 67th Cong., 4th Sess., p. 4):

> "If navigation were to be considered as of paramount importance on this river, it would necessarily mean very serious interference with the agricultural and industrial development of the country tributary to it. Further dams across the stream must be constructed. Further water must be diverted, and a large quantity will be permanently lost to the volume of the river through evaporation, consumption, and diversion from the stream system. To render the river commercially navigable in fact requires a supply of water considerably greater in volume and more regular in flow than that now available. The basis for the recital in the compact that 'the reservation of its waters for navigation would seriously limit the development of its basin' is therefore apparent.
>
> "It is estimated by the Reclamation Service that some 4,000,000 acres of land at present arid, barren, unoccupied, and practically worthless can be irrigated from the waters of this river and made fertile and productive. Such development means population, prosperous homes, and thriving cities. There are power possibilities on the river involving the creation of millions of horsepower of hydro-electric energy with which to put into operation and maintain vast industries furnishing profitable employment. The possibilities of agricultural and industrial development are so great and their ramifications so far-reaching as to dwarf any values in the use of this river for navigation. Navigation and diversion for agriculture may not proceed economically together, for one necessarily impairs the other.

> These are the considerations which induce the declaration that the use of water 'for the purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural, and power purposes.'"

Congress accepted Mr. Hoover's views and consented to the Compact, including paragraph (a) of Article IV, without exception or reservation. To make this consent more emphatic and more effective, Congress went further and "enthroned" the Compact (including Paragraph (a) of Article IV), by providing in Section 8(a) of the Act (Bill, 70):

> "The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried, and/or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this Act to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide."

Thus, by the terms of the Act itself, the recital therein that one of its purposes is the improvement of navigation must yield to and be controlled by the declaration in the Compact that "the Colorado River has ceased to be navigable for commerce," and that "the use of its waters for purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural, and power purposes."

Arizona does not concur in the statement that the

Colorado River has "ceased" to be navigable. She alleges that it never was navigable. (Bill, 6, 7.) But even if its navigability were conceded, it would still be true that the Act, by accepting and approving this declaration in the Compact, shows on its face that improvement of navigation is not its purpose. Also, though navigability were conceded (as it is not), it would still be true, as shown above, that the effect of the Act is not to improve, but to destroy such navigability.

(*b*). *The Project.*

The project which the Act provides for is to consist of a dam, reservoir, power plant and incidental works and structures at Black Canyon and a main canal and appurtenant structures connecting Laguna Dam with the Imperial Valley in California. The project is to be constructed, maintained and operated by the Secretary of the Interior. (Bill, 58.)

By Sections 1, 6 and 8(a) of the Act, the construction, maintenance, operation and use of the project are made subject to the terms and provisions of the Colorado River Compact. (Bill, 58, 68, 70.) Since, in case of conflict, the provisions of the Act must yield to those of the Compact (Bill, 70), any use of the project which may be inconsistent with the Compact (though apparently authorized by the Act) is prohibited. Thus the primary use to which the project is to be put is the enforcement of a Compact which declares that "the Colorado River has ceased to be navigable for commerce," and that "the use of its waters for purposes of navigation shall be sub-

servient to the uses of such waters for domestic, agricultural, and power purposes".

Aside from its use in enforcing the Compact, the Act specifies, definitely and concretely, only two uses to which the project shall be put. One is the storage and sale of water. The other is the generation and sale of electric power. (Bill, 64-69.) Both uses would be hurtful rather than helpful to navigation, if there were any navigation to be hurt or helped.

It requires no argument to show that the navigation of a river, which (if it ever was navigable) has become non-navigable from lack of water, cannot be improved by taking more water out of it. Yet that is what this Act proposes to do. All contracts for the sale and delivery of water are required to be made subject to the Colorado River Compact (Bill, 70), which subordinates navigation to other uses of the river. (Bill, 54.) The Act places no limit on the quantity of water which the Secretary may divert and sell, nor does it restrict him as to the place of diversion or as to the place of consumption. Water sold by him may be diverted from the river at a point above the proposed dam, thus precluding any possible use of such water in navigation, and it may be transported any distance from the river, even to points beyond the Colorado River watershed.

Under color of the Act, defendant Wilbur has actually made a pretended contract whereby he undertakes to deliver to the Metropolitan Water District of Southern California 1,050,000 acre-feet annually of the water to be stored in the proposed reservoir. (Bill, 81.) This great quantity of water—more than one-eighth of the total unappropriated flow at Black Canyon—is to be delivered at a point immediately

below the dam or, at the option of the District, it may be diverted directly from the reservoir. (Bill, 81, 83.) In neither case could the water so diverted be used in navigation, even if the river were navigable. If it is diverted above the dam, the District must pay a higher price for it, not because of the loss to a non-existent navigation, but because of the loss which the power business will suffer thereby. (Bill, 83.) The District where this water is to be consumed is some 300 miles from the Colorado River and outside of its watershed. (Bill, 35.) The performance of this contract, if there were any navigation to be affected, would affect it adversely. The contract was obviously not intended to improve navigation, but was designed to accomplish a wholly different purpose, which defendant Wilbur himself has stated as follows (Cong. Rec., Feb. 3, 1931, vol. 74, p. 3995):

> "A river full of water will be taken 260 miles across the plains, lifted over a mountain range, and plunged down onto the coastal plain about Los Angeles to raise the water line still more and permit an otherwise impossible growth of population. An adequate supply will be made available to all the communities between Los Angeles and San Diego, sitting on the Mexican border, where millions may come to live with irrigated rose gardens about their homes and with irrigated trees dropping ripened fruit into their laps. * * *"

Even if the Colorado River were navigable, it could not be pretended that navigation thereof would be improved by the main canal and appurtenant structures connecting Laguna Dam with the Imperial Valley. That these works would impair rather than

improve navigation (if navigation existed) is self-evident. The whole purpose of the canal is to take water out of the river, and to take it out in greater quantities and at a point higher up the river than now. (Bill, 20.) This would necessarily diminish the navigable capacity of the river (if it had any) between Laguna Dam and the Gulf of California.

In this connection, it should be observed that the Act discriminates against Arizona and in favor of California, by providing this canal and the appurtenant structures, at a cost of $40,000,000, to facilitate the use of Colorado River water in California, while providing no similar facilities nor any facilities whatever for the benefit of Arizona water users, and by further providing that this water, which is to be stored in Arizona and made available by the use of Arizona's natural resources, shall be delivered without charge for use in the Imperial Valley, but that if used in Arizona, it must be bought and paid for. (Bill, 20.) And yet the use of water in Arizona would be less injurious to navigation (if any existed) than its use in California. Water used in Arizona may, and some of it will, find its way back into the river, but water used in the Imperial Valley, which is below sea level, can never be used again for any purpose. Therefore, if any thought of improving navigation had been in the mind of Congress, it would not have perpetrated this unconscionable and indefensible discrimination.

Even if the river were navigable, it could not be claimed that the generation or sale of electric power would of itself improve or tend to improve its navigability, nor could it be claimed that these activities are merely incidental to such improvement. The Act

under which the proposed power plant is to be constructed, maintained and operated is controlled by a Compact which declares that "the Colorado River has ceased to be navigable for commerce", and that "the use of its waters for purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural, and power purposes" (Bill, 54.) That which is dominant cannot be merely incidental to that which is subservient.

Moreover, it appears from the documents discussed in the Appendix hereto (pp. 93-103), that even in the old days, when its normal flow (now reduced by one-half) had not been depleted, it was only in seasons of high water that the Colorado River ever approached a condition of navigability—a condition which, even then, it never quite attained. By storing the water and using it for the generation of electric power, as proposed in the Act, the flow of the river will be "equated", there will be no more seasons of high water, and all possibility of navigation will be automatically ended.

The pretense that this is a navigation act has no other basis than the recital in Section 1 that "improving navigation" is one of its purposes, and the recital in Section 6 that "improvement of navigation" is one of the uses to which the proposed dam and reservoir shall be put. (Bill, 58, 68.) As introduced, the bill (H. R. 5773) which is now the Boulder Canyon Project Act, did not contain the word "navigation". The words "improving navigation" and "improvement of navigation" were inserted as amendments, upon recommendation of the House Committee on Irrigation and Reclamation, after hearings, in the

course of which the constitutionality of the bill had been questioned. (House Report 918, 70th Cong., 1st Sess., p. 1.) No other reference to navigation was inserted or proposed. As to these amendments, Representative Leatherwood, of Utah, a member of the House Committee on Irrigation and Reclamation, justly observed in his minority report (House Report 918, 70th Cong., 1st Sess., Part 3, p. 14):

> "A new primary purpose of the project was put forward during the last meetings of the committee. This purpose is the improvement of navigation. I feel sure that the Congress is going to be most interested in this novel conception of the needs of navigation and the means of satisfying them. But for the authors of this bill, it would scarcely have occurred to many members that the Colorado River in its 500-mile course through the desert wastes of Arizona, Nevada, and California, from the Grand Canyon to the Gulf, was a locality where $100,000,000 should be spent in aid of navigation. It may occasion some surprise also that the Committee on Irrigation and Reclamation should for six years have retained jurisdiction over this important proposal for the improvement of navigation instead of relinquishing the control to the Rivers and Harbors Committee. But in extenuation of this conduct on the part of my committee, let me hasten to explain that it was not until the last week of these six long years of study and consideration of this navigation measure that the committee itself discovered that it was a bill for the improvement of navigation."

The truth is, of course, that these amendments were inserted as a belated afterthought, and in the mistaken belief that the word "navigation" possessed a magic

which would validate an otherwise unconstitutional measure. (*Child Labor Tax Case*, 259 U. S. 20, 38.) As introduced, as amended, and as finally passed, this was and is a navigation measure only in the sense that, if the Colorado River were navigable, its navigability would be destroyed by putting the Act into effect.

5. By This Act, Even Assuming the River to be Navigable, Congress Has Exceeded Its Powers and Has Invaded Rights Reserved to the State.

Regardless of the effect of the Act on navigation, defendant Wilbur and the States of California, Colorado, New Mexico, and Nevada insist that Arizona is not entitled to complain. (Wilbur Brief, 2, 18-26, 34-37; California Brief, 2, 4; Colorado Brief, 2, 10-15, 22-30.) Their contention seems to be that navigable rivers are subject to the control of Congress, not only for the purpose of regulating navigation, but for any other purpose which Congress may desire to accomplish; that a river once shown to be navigable is thereby withdrawn and removed from the jurisdiction and control of the State, not only for the purpose of regulating navigation, but for all purposes; that since the Colorado River is (as they say) a navigable river, the State of Arizona can have no rights in it; and that, therefore, regardless of what Congress has attempted to do with the river, the State cannot be heard to complain. The unsoundness of this contention is established by decisions of this Court forming an unbroken line from 1842 to the present day.

"* * * For when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government. * * *"

(By Chief Justice Taney in *Martin v. Waddell*, 16 Pet. 367, 410.)

"* * * To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers. But in the hands of the states this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution. * * *

"By the preceding course of reasoning we have arrived at these general conclusions: First, The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, The new states have the same rights, sovereignty, and jurisdiction over this subject as the original states. Thirdly, The right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case. * * *"

(By Mr. Justice McKinley in *Pollard v. Hagan*, 3 How. 212, 230.)

"* * * Settled rule of law in this court is, that the shores of navigable waters and the soils under the same in the original States were not

granted by the Constitution to the United States, but were reserved to the several States, and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders."

(By Mr. Justice Clifford in *Mumford v. Wardwell*, 6 Wall. 423, 436.)

"* * * Although the title to the soil under the tidewaters of the bay was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future State. Upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tidewaters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such maner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States, the regulation of which was vested in the General government."

(By Mr. Justice Field in *Weber v. Board of Harbor Commissioners*, 18 Wall. 57, 65)

"By the American Revolution the people of each State, in their sovereign character, acquired the absolute right to all their navigable waters and the soil under them. The shores of navigable waters and the soil under them were not granted by the Constitution to the United States, but were reserved to the States respectively. And new States have the same rights of sovereignty and jurisdiction over this subject as the original ones."

(By Mr. Justice Swayne in *County of St. Clair v. Lovingston*, 23 Wall. 46, 68.)

"The principle has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. * * * In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty."

(By Chief Justice Waite in *McCready v. Virginia*, 94 U. S. 391, 394.)

"* * * Such title to the shore and lands under water is regarded as incidental to the sovereignty of the State—a portion of the royalties belonging thereto and held in trust for the public purposes of navigation and fishery—and cannot be retained or granted out to individuals by the United States. * * * Such title being in the State, the lands are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce. The State may even dispose of the usufruct of such lands, as is frequently done by leasing oyster beds in them, and granting fisheries in particular localities; also, by the reclamation of submerged flats, and the erection of wharves and piers and other adventitious aids of commerce. Sometimes large areas so reclaimed are occupied by cities, and are put to other public or private uses, state control and ownership therein being supreme, subject only to the paramount authority of Congress in making regulations of commerce, and in subjecting the lands to the necessities and uses of commerce. * * *"

(By Mr. Justice Bradley in *Hardin v. Jordan*, 140 U. S. 371, 381.)

"It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several States, and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders. * * * Upon the acquisition of the territory from Mexico the United States acquired the title to tide lands equally with the title to upland; but with respect to the former they held it only in trust for the future States that might be erected out of such territory. * * *"

(By Mr. Justice Lamar in *Knight v. United States Land Ass'n*, 142 U. S. 161, 183.)

"But it is useless to pursue the inquiry further in this direction. It is enough for the purposes of this case that each State has full jurisdiction over the lands within its borders, including the beds of streams and other waters. * * *"

(By Mr. Justice Brewer in *Kansas v. Colorado*, 206 U. S. 46, 93.)

"* * * Besides, it was settled long ago by this court, upon a consideration of the relative rights and powers of the Federal and state governments under the Constitution, that lands underlying navigable waters within the several States belong to the respective States in virtue of their sovereignty and may be used and disposed of as they may direct, subject always to the rights of the public in such waters and to the paramount power of Congress to control their navigation so far as may be necessary for the regulation of commerce among the States and with foreign nations, and that each new State, upon its admission to the Union, becomes endowed with the

same rights and powers in this regard as the older ones. * * *"

(By Mr. Justice Van Devanter in *Scott v. Lattig*, 227 U. S. 229, 242.)

"The right of the United States in the navigable waters within the several States is limited to the control thereof for purposes of navigation. Subject to that right Washington became, upon its organization as a State, the owner of the navigable waters within its boundaries and of the land under the same. * * * The character of the State's ownership in the land and in the waters is the full proprietary right. The State, being the absolute owner of the tide lands and of the waters over them, is free in conveying tide lands either to grant with them rights in the adjoining water area or to completely withhold all such rights. * * *"

(By Mr. Justice Brandeis in *Port of Seattle v. Oregon & Washington R. R. Co.*, 255 U. S. 56, 63.)

"The right of the United States in the navigable waters within the several States is, however, 'limited to the control thereof for the purposes of navigation.' * * * And while Congress, in the exercise of this power, may adopt, in its judgment, any means having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution, * * * it may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end. * * *"

(By Mr. Justice Sanford in *United States v. River Rouge Improvement Co.*, 269 U. S. 411, 419.)

Applied to the Colorado River (and assuming it to be navigable) these decisions[1] establish the following propositions:

First. If and wherever navigable, the Colorado River belongs to and is owned by the State in which it is situated. The State in its sovereign capacity owns the water in the river, the bed of the river, and its banks to high water mark. This is a full proprietary ownership. It is subject to the power of Congress to regulate commerce by improving navigation. It is not subject to any other restriction or limitation. The State, being the owner, has the exclusive and unrestricted right to use and dispose of the water in the river and the land under it, to authorize the use thereof by others, and to regulate and control such use in whatever manner and to whatever extent it sees fit, subject only to the power of Congress in respect to navigation. The State's right of ownership and right to use and control the use of the river for all other purposes are reserved to it by the Constitution of the United States.

Second. Even assuming the Colorado River to be

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[1] See also *Goodtitle v. Kibbe*, 9 How. 471, 477; *Doe v. Beebe*, 13 How. 25, 26; *Den v. Jersey Co.*, 15 How. 426, 432; *Smith v. Maryland*, 18 How. 71, 74; *Gilman v. Philadelphia*, 3 Wall. 713, 726; *Barney v. Keokuk*, 94 U. S. 324, 338; *Packer v. Bird*, 137 U. S. 661, 666; *Manchester v. Massachusetts*, 139 U. S. 240, 260; *Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co.*, 142 U. S. 254, 273; *Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387, 435; *Shively v. Bowlby*, 152 U. S. 1, 26, 58; *Eldridge v. Trezevant*, 160 U. S. 452, 468; *St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners*, 168 U. S. 349, 359; *Green Bay & Miss. Canal Co. v. Patten Paper Co.*, 172 U. S. 58, 77; *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 703; *Illinois Central R. R. Co. v. Chicago*, 176 U. S. 646, 659; *Mobile Transportation Co. v. Mobile*, 187 U. S. 479, 482; *United States v. Mission Rock Co.*, 189 U. S. 391, 404; *Hardin v. Shedd*, 190 U. S. 508, 519; *United States v. Chandler-Dunbar Water Power Co.*, 209 U. S. 447, 451; *McGilvra v. Ross*, 215 U. S. 70, 79; *The Abby Dodge*, 223 U. S. 166, 174; *Oklahoma v. Texas*, 258 U. S. 574, 583; *Appleby v. New York*, 271 U. S. 364, 381.

navigable, the United States does not own it, and has no right to use it or control it for any purpose, except that of regulating commerce by improving navigation. Not being the owner, the United States cannot, for any purpose or upon any pretext, sell or dispose of the water in the river or the land under it. The power to direct or authorize any such use, control, sale or disposal of the water in or the land under the river has not been delegated to Congress by the Constitution of the United States.

The fact that other States have rights in the Colorado River adds nothing to the powers of Congress. Where the river forms the boundary between Arizona and another State, each owns to the middle of the stream. (*Supra*, 3.) If they disagree about the division or use of boundary waters, their dispute, like any other interstate boundary dispute, can be settled by a decree of this Court. Congress is powerless to settle it or to make any division or apportionment of such waters. *Louisiana v. Mississippi*, 202 U. S. 1, 40; *Washington v. Oregon*, 211 U. S. 127, 131; *New Mexico v. Colorado*, 267 U. S. 30, 41. The same is true of a controversy between an upper and a lower state. *Kansas v. Colorado*, 185 U. S. 125, 145; S. C. 206 U. S. 46, 98; *Wyoming v. Colorado*, 259 U. S. 419, 465.

The result, therefore, of assuming the Colorado River to be navigable is to establish even more firmly Arizona's right to appropriate and use its waters and to regulate and control their appropriation and use by others. That this right is invaded and threatened with destruction by the Boulder Canyon Project Act has been abundantly shown. It has also been shown that improvement of navigation—the only ground

upon which Federal interference with State control of navigable waters can ever be justified—is not the purpose or effect of the Act. It necessarily follows that, in passing this Act, Congress has exceeded the powers delegated to it by the Constitution.

IV.

THE BOULDER CANYON PROJECT ACT, NOT BEING AN EXERCISE OF POWER GRANTED BY THE COMMERCE CLAUSE, CANNOT BE SUSTAINED UNDER ANY OTHER PROVISION OF THE CONSTITUTION.

Defendant Wilbur contends that, regardless of the power of Congress under the commerce clause, the Act is constitutional. He urges three grounds for sustaining it, reclamation of public land, prevention of floods, and the general welfare. In none of these can a constitutional basis for this Act be found.

1. The Act Cannot Be Sustained as a Regulation Respecting Property of the United States Under Article IV, Section 3, Clause 2, of the Constitution.

(a). *It is Not Pretended, and Cannot Be, That This Act Provides for the Reclamation of Any Public Land.*

There is nothing in the Act or in the pleadings to indicate that there is an acre of land belonging to the United States which can be irrigated by water from the proposed reservoir. But even more important, the Act does not provide for the irrigation of any public land, if any exists.

The only mention of reclamation of public land contained in the entire Act, beyond the recital of purposes in Section 1, is in Section 9. This section relates solely to such public lands in California as may be found by the Secretary to be practicable of irrigation from the All-American Canal, and merely provides that they be withdrawn from entry and reopened in small plots, and that if and when taken up, entrymen shall pay an equitable share of the construction cost of the canal and appurtenant structures. Since the route of the canal is not determined by the Act, and has not yet been determined, it can hardly be claimed that this section provides for the reclamation of public land. Section 9 is obviously inserted to enable the Secretary to prevent speculation in public land, if any exists, along any of the possible routes of the All-American Canal.

Furthermore, the works authorized in this Act will not irrigate any public land in the Imperial or Coachella Valleys, if any such land exists. The authorization of $165,000,000 for the construction of works provided for in the Act was made upon the report of the Colorado River Board created by the Joint Resolution approved May 29, 1928. (45 Stat. 1011.) The canal, the cost of which was included within the amount of $165,000,000, was stated by the Board to be only a canal reaching the distribution system of the Imperial Valley. To include any other land not reached by that system would require additional construction costing $11,000,000. (House Doc. 446, 70th Cong., 2d Sess., p. 7.) This was not authorized by the Boulder Canyon Project Act. All land irrigated by the Imperial Valley distributing system is said by Senate Document 142, 67th Cong., 2d Sess., p. 74, cited by the Wilbur brief, p. 34, to be privately owned.

So far as public land elsewhere located is concerned, it is enough to point out that, under the Reclamation Law, no reclamation project may be instituted until the Secretary has made findings in writing regarding cost, feasibility and probability of return of cost to the United States; until the President has approved the project; and until Congress has made the necessary appropriation. U. S. C. Title 43, Sec. 412, 413, 414. None of these steps has been taken to ascertain the possibility of or to institute any such irrigation projects.

Neither the House nor the Senate Committee reporting this bill contended in stating the purposes of the project that the effect of this Act would be to irrigate any public land whatever. The statements regarding irrigation are substantially the same. We quote from the House report (House Report 918, 70th Cong., 1st Sess., p. 6):

> "Second. It will end an intolerable situation which now exists in Imperial Valley. This Valley now secures its sole water supply by a canal which runs for some 60 miles through Mexico. The All-American Canal will furnish a substitute for this and at the same time carry the water at an elevation sufficient *to make possible, at some future date,* the irrigation of additional land, mostly public, lying about the rim of the cultivated area." (Italics ours.)

Thus the contention is not and cannot be that *this Act* provides for the reclamation of any public land, but merely that the works authorized by this Act for other purposes may "at some future date" be availed of, in the discretion of Congress, to reclaim public land,— in other words, that while no present reclamation is provided for, one purpose is future

reclamation. But the Act will not warrant even this attenuated claim of purpose. Regarded as a provision for future reclamation of public land, it is fantastic.

First: All uses of water in California, on public as well as on private lands, are limited both by the Compact (Act, Sec. 8(a)) and by agreement with California (Act, Sec. 4(a)). The apportioned waters will be exhausted by the 6,500,000 acre-feet of present uses plus the 1,050,000 acre-feet to be delivered under the Metropolitan Water District contract, leaving only half of the surplus waters available. Private users will be entitled to contract for this water, subject to the Mexican burden and future reapportionment, with the result that when the "future date" arrives for the reclamation of public land, if any, the limit will have been reached. Certainly every inducement is offered private owners to exhaust the limit before public reclamation projects can do so.

Second: In Arizona all water used, whether on public or private land, is made subject to the future claims of the Upper Basin to the extent of its apportionment. It is hardly possible that Congress intends to institute costly reclamation projects to use this water, when it expressly recognizes the prior rights of the Upper Basin States to it. Certainly the Upper Basin representatives in Congress would not approve such action. It would be hard to imagine a course more fruitful of controversy than this. As to surplus water, this is subject to variations in river flow, to the Mexican burden and future reapportionment—hardly the most ideal water with which to irrigate public land for entry and purchase by settlers.

It is not necessary to go into further detail.

Enough has been said to indicate that as a provision for the future reclamation of public land, no more mad or irrational system could be devised. Almost every conceivable obstacle is placed in the way of future public reclamation projects in the Lower Basin.

The truth of the matter is, of course, that reclamation of public land has no part whatever in the purposes of this Act. It is a mere pretense to cloak the exercise of powers not delegated to Congress but reserved to the States.

(*b*). *This Act Goes Far Beyond the Power of Congress Over the Public Land.*

The power of Congress to make regulations concerning the reclamation of land of the United States does not include the power to override State laws in respect to the general subject of reclamation, as this Act attempts to do. In *Kansas v. Colorado*, 206 U. S. 46, 92, this Court, speaking through Mr. Justice Brewer, said:

> " * * * As to those lands within the limits of the States, at least of the Western States, the National Government is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property. We do not mean that its legislation can override state laws in respect to the general subject of reclamation. While arid lands are to be found, mainly if not only in the Western and newer States, yet the powers of the National Government within the limits of those States are the same (no greater and no less) than those within the limits of the original thirteen, and it would be strange if, in the absence of a definite

grant of power, the National Government could enter the territory of the States along the Atlantic and legislate in respect to improving by irrigation or otherwise the lands within their borders. Nor do we understand that hitherto Congress has acted in disregard to this limitation. * * *"

Ever since the Reclamation Act of 1902, Congress has recognized this and specifically provided that the projects shall be carried out in conformity with state law.[1] We have already pointed out not only that this project is to be carried out in defiance of Arizona law, but that the very purpose of the Act is to override the laws of Arizona in respect of the use of Colorado River water, and to enforce in that State the provisions of the Colorado River Compact, which Arizona has rejected. This, and not reclamation, is one of the purposes of the present Act. Reclamation can be, and has been for thirty years, accomplished under the Reclamation Act. No legislation is needed for that purpose. But the imposition of the Compact upon Arizona cannot be accomplished under the Reclamation Act, and so this statute is enacted to do it. The very Act provides (Sec. 4(a)) that it shall not take effect until the Compact, which it approves (Sec. 13), is ratified without Arizona's consent, and that every use made of river water or of the dam, and even the laws of the State, shall be subject to the Compact. (Sec.

[1] "Nothing in this chapter shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof." (U. S. C. Title 43, Sec. 383, June 17, 1902, c. 1093, Sec. 8, 32 Stat. 390.)

4(b), 5, 6, 8, 13, 18, 19.) Enforcement of the Compact is the heart of the Act.

Whatever else may be said about such a purpose it is patently extraneous to the reclamation of public land, and an attempt to exercise powers reserved to the States.

There is a suggestion in the Wilbur brief that some provisions of the Arizona Enabling Act, Sections 20 and 28, support this asserted power. Section 28 is clearly irrelevant. This provides the manner in which land granted to the State by the United States may be sold, and that within five years the Secretary of the Interior may exchange other lands for granted lands which may contain power sites. Section 20 provides that an irrevocable ordinance shall be passed, containing among other provisions, and in addition to the usual disclaimer of title to the ungranted public land, the following:

> "Seventh. That there be and are reserved to the United States, with full acquiescence of the State, all rights and powers for the carrying out of the provisions by the United States of the Act of Congress entitled 'An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands,' approved June seventeenth, nineteen hundred and two, and acts amendatory thereof or supplementary thereto, to the same extent as if said State had remained a Territory."

This last provision was inserted in the Arizona Constitution, Article XX, Paragraph Tenth, and subsequently stricken therefrom by amendment effective June 27, 1927. (Session Laws of Arizona, 1927, pp. 557-561.) The attempt made by this section of the

Enabling Act to deny to Arizona admission to the Union upon an equal footing with the other States was beyond the power of Congress and ineffective. This principle is too well settled by decisions of this Court to require further discussion. *Coyle v. Smith*, 221 U. S. 559; *Bolln v. Nebraska*, 176 U. S. 83; *Ward v. Race Horse*, 163 U. S. 504; *Van Brocklin v. Tennessee*, 117 U. S. 151, 164-165, 167; *Escanaba Co. v. Chicago*, 107 U. S. 678, 688; *Pollard v. Hagan*, 3 How. 212, 223. Compare *Kansas v. Colorado*, 206 U. S. 46, 88-93.

Nor do the cases cited on page 23 of the Wilbur brief (see, *infra*) in any way support the present statute. These cases merely announce the unquestioned rule that under Article IV, sec. 3, cl. 2, of the Constitution, Congress has power to protect the public land, control its use and prescribe in what manner others may acquire rights therein, and that the States may not interfere with the exercise of this power. Arizona does not seek in any way to interfere with the accomplishment of any of these purposes. It has not changed its laws as to streams in any respect (compare *Boquillas Land and Cattle Co. v. Curtis*, 213 U. S. 339) and so has not overstepped any rule laid down in *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 703. It has not attempted to divert water the undiminished flow of which was granted by treaty, as in *Winters v. United States*, 207 U. S. 564; nor taxed public lands (*Stearns v. Minnesota*, 179 U. S. 223, 245); nor attempted to permit trespasses on public lands (*Utah Power & Light Co. v. United States*, 243 U. S. 389, 403-404); nor denied the validity of any rights granted by the United States while Arizona was a territory (*United States v. Holt State Bank*, 270

U. S. 49, 54-55); nor interfered with the protection of the public land from injury (*Hunt v. United States*, 278 U. S. 96, 100).

The present case does not involve in any manner the power of Congress to reclaim public land. It raises no question whether or not the long accepted practice of requiring such projects to be carried out in conformity with State law is necessitated by the Constitution. It does raise the legality of acts in no way connected with the reclamation of public land, the purpose and effect of which is to invade the *quasi*-sovereign rights of the State in the waters within its boundaries.

2. The Act is Not an Exercise of Any Other Power Delegated to Congress.

The Constitution does not grant to Congress any power to control floods as such, popular superstition to the contrary notwithstanding. Congress, in the exercise of its power to control and improve navigation in interstate or foreign commerce, conferred by the commerce clause, may and has undertaken works to control floods which menace that navigation. But the power is to improve and protect the navigation. *Bedford v. United States*, 192 U. S. 217, 223; *Jackson v. United States*, 230 U. S. 1, 23; *Hughes v. United States*, 230 U. S. 24, 33; *Cubbins v. Mississippi River Commission*, 241 U. S. 351, 369.

We have already shown that the Colorado is not a navigable river; that the purpose of this Act is not to improve navigation, but to destroy any possibility of it; and that the Act cannot be sustained under the commerce clause.

But it is contended (Wilbur Brief, 23) that the

purpose is to control floods for the purpose of protecting government property. There is nothing whatever before the Court to suggest that any property of the United States is menaced by floods on the Colorado, or that Congress believed such to be the case. Appendix B of the Wilbur brief (pp. 47-59), entitled "Flood Control", contains a report of the Director of the Reclamation Service and the reports of the House and Senate Committees on this bill relating to flood control. There is not a word in any of these documents even to intimate that property of the United States is menaced by floods, or that this Act is intended to or will have the effect of protecting any such property.

The Wilbur brief is then thrown back on the general welfare argument. It says (pp. 36-37):

> "Even where Congress has no power to enact regulatory legislation as to a subject matter, it may make appropriations for the public welfare. * * * Even if the dam were to be erected solely in order to save the Imperial Valley from destruction, the Boulder Canyon Project Act would be constitutional."

Obviously the practice of Congress in making appropriations which require no act to be done in any State without its consent, and which are not questioned by any person with sufficient interest to maintain a suit (compare *Massachusetts v. Mellon*, 262 U. S. 447), has no bearing upon the present case. This is not such an act. Here defendant Wilbur is authorized to do acts in Arizona which violate its laws, and which the State resists. He is authorized to seize and regulate the use of natural resources of the State in such a way as to deny all beneficial use of them to Arizona and its people. No matter how worthy

the motives of Congress may be, or how beneficial to the Imperial Valley, Congress has no such power under the Constitution.

Furthermore, the dam is not erected solely to save the Imperial Valley. Arizona has no desire to injure the Imperial Valley or deny it protection. It is well known that there is no danger of its "destruction",[1] but such danger as there is, Arizona is quite willing to cooperate in averting. It is not now faced with any such question, but with an attempt, initiated by California, to have defendant Wilbur erect structures in Arizona and divert water from Arizona, first to generate power for California, second to irrigate private lands in California, and third to furnish a municipal water supply for Southern California cities;[2] and, in order to obtain the acquiescence of the Upper Basin States, to prevent Arizona and its people making appropriation of any of the unappropriated flow of the river within the borders of Arizona. It is difficult to believe that the attempted justification of

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[1] "* * * In the interest of truth, however, it must be stated that the flood of 1905 flowed through the banks of the Colorado at a point on the river where the farmers of the Imperial Valley had themselves made the break in the banks. (S. Doc. 142, 67th Cong., 2d Sess.) It must also be made clear that the total value of property destroyed during and as a result of that flood did not exceed $5,000,000 in spite of the fact that for over 18 months practically the entire flow of the Colorado ran through the Imperial Valley and into the Salton Sea. It must also be stated that during that entire period only 8 lives were lost, 6 of which were those of men who, while in line of duty, fell off the break in the levees on which they were working and 2 of whom were drowned while attempting to cross the river on a temporary cableway. This is a true picture and a true statement of what actually occurred in the great flood of 1905. (Reference H. R. 5773 hearings, pt. 3, p. 433.)" (House Report 918, 70th Cong., 1st Sess., part 2, p. 5.)

[2] In a joint letter dated March 24, 1924, from Secretaries Work, Wallace and Weeks (constituting the Federal Power Commission) to the Chairman of the House Committee on Irrigation and Reclamation, relative to this project, the Secretaries said (Hearings on H. R. 2903, 68th Cong., 1st Sess., Part 5, p. 1000):

"Flood control and irrigation storage are presumed to be the primary purposes for which it is proposed to construct the dam at

such an invasion of the *quasi*-sovereign rights of the State, upon the ground that the Act is a mere appropriation for the public welfare, can be seriously made.

It is also immaterial that prior to the passage of this Act California and its people might lawfully appropriate unappropriated Colorado River water flowing within the boundaries of that State. (Wilbur Brief, 35.) Neither California nor its people may, against the wishes of Arizona, invade its territory to construct works there and divert and consume water from Arizona. Furthermore, the Act does not merely make possible the appropriation of water in California. It attempts to authorize an officer of the United States to seize and assume control of all un-

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Boulder Canyon. While there are differences of opinion with respect to the amount of storage actually required for these purposes, it is agreed that 8,000,000 acre-feet is the maximum required, and it is probable that 4,000,000 feet would be reasonably adequate. The nearer the reservoir is installed to the lands to be protected or irrigated, the more satisfactorily will it serve the purposes of flood control and irrigation. Information recently made available indicates that a reservoir of sufficient capacity to serve all the needs of flood control and irrigation could be located on the river some 100 miles nearer the lands to be served and at a cost of not more than one-half that of the proposed high dam of Boulder Canyon. If this is correct, the location of the dam at Boulder Canyon and its construction to the height proposed must be justified, if at all, wholly from the standpoint of the development of electric power.

* * * * * * * * * *

"In so far, at least, as the project exceeds the requirements of flood control and irrigation, the bill proposes that the United States undertake a new national activity, namely, the business of constructing facilities for production of electric power for general disposition, an activity which, if logically pursued, has possibilities of demands upon the Federal Treasury in amounts far beyond those now involved in reclamation and highway construction combined. While the United States has heretofore constructed power developments in connection with irrigation projects, these developments have been merely incidental to the projects, have been of a few thousand horsepower only, and have been primarily for use on the projects themselves. The construction of a reservoir having a capacity of from four to eight times the needs of irrigation and flood control and of a power development twenty times in excess of the probable power needs of the irrigated lands and adjacent communities is a complete departure from former policies. * * *"

appropriated water in the Colorado and, thereafter, in his discretion to dispose of such water by contract, and to prevent any use thereof except by such contracts. These contracts deny the right to appropriate water, and attempt to substitute therefor rights of use, subject to subsequent defeasance, as provided in the Colorado River Compact. This statute cannot be justified as authorizing any act which California might herself undertake.

CONCLUSION.

The bill is not vulnerable to any of the objections made in the motions to dismiss. This is not, in form or in substance, a suit against the United States. The bill presents a justiciable controversy within the jurisdiction of this Court. The rights asserted and sought to be protected are not political or abstract, but are *quasi*-sovereign and property rights of the State of Arizona, which defendants are now injuring and threatening to injure and destroy, and which this Court's equity powers are competent to protect. The Act under color of which these injuries are being committed and threatened cannot be justified under the commerce clause or any other clause of the Constitution. The motions to dismiss should, therefore, be denied.

Respectfully submitted,

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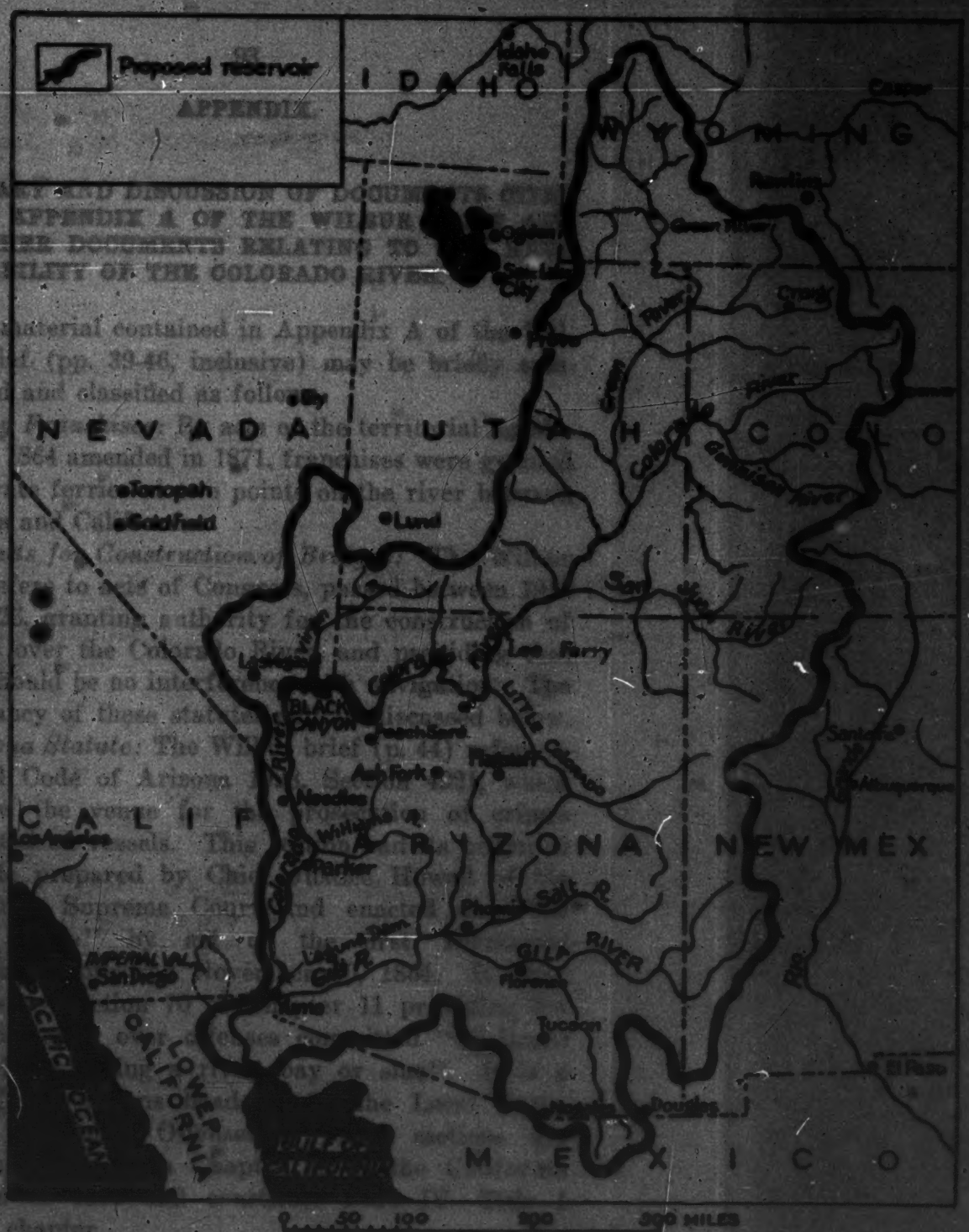

MAP OF COLORADO RIVER DRAINAGE BASIN

APPENDIX.

SUMMARY AND DISCUSSION OF DOCUMENTS CITED IN APPENDIX A OF THE WILBUR BRIEF AND OTHER DOCUMENTS RELATING TO THE NAVIGABILITY OF THE COLORADO RIVER.

The material contained in Appendix A of the Wilbur brief (pp. 39-46, inclusive) may be briefly summarized and classified as follows:

Ferry Franchises: By acts of the territorial legislature in 1864 amended in 1871, franchises were granted to operate ferries at two points on the river between Arizona and California.

Permits for Construction of Bridges: The Wilbur brief refers to acts of Congress, passed between 1913 and 1926, granting authority for the construction of bridges over the Colorado River, and providing that there should be no interference with navigation. The irrelevancy of these statutes will be discussed below.

Arizona Statute: The Wilbur brief (p. 44) refers to Revised Code of Arizona 1928, Section 4921, which provides the venue for the prosecution of crimes committed on vessels. This section had its origin in the code prepared by Chief Justice Howell of the Territorial Supreme Court and enacted as "The Howell Code" by act of the first Territorial Legislature approved November 10, 1864. It there appears as Section 70 of Chapter 11 providing for the jurisdiction over offenses committed "on board a vessel navigating a river, bay or slue". It is a part of 12 sections headed "Of the Local Jurisdiction of Public Offenses." These sections are taken verbatim from Chapter 29 of the California Statutes of 1851 and constitute Part IV—Title I of that chapter.

Territorial Legislative Memorials: In 1864, 1865, 1883, 1884, 1885, 1889, the Territorial Legislature memorialized Congress to appropriate from $100,000 to $150,000 to make the river above Yuma "permanently navigable." (Acts of 1883, pp. 301-2.) Claims are made that the river is navigable "in high stages of water" (Acts of 1865, p. 77), but that it is difficult and dangerous. (Id.) Congress appropriated $25,000 in 1884. No further appropriations were made. In 1909 there was a request for appropriation to dredge the channel below Yuma. No appropriation was made. In 1909 the river changed its course in Mexico as is pointed out below.

In 1866 a resolution was passed (Acts of 1866, p. 61) expressing the gratitude of the legislature to "Admiral" Rogers, Commander of the "Esmeralda", who by "indomitable energy" had taken that flat-bottomed stern wheeler up the river as far as Callville. The memorial of November 5, 1866 (Acts of 1866, pp. 67-68), was one protesting against the inclusion in Nevada of the territory now forming the southern part of that State below the 37th parallel, and making a glowing picture of the future of that area if added to Arizona.

The memorials of 1903 and 1909 (Wilbur Brief, 41, 43) urged appropriations for the construction of a levee and bridge, respectively. The alleged navigable character of the river was given as a reason for Congressional generosity. The appropriations were not made.

Reports of Territorial Governors: The requests for appropriations from Congress were taken up by Governor Hughes in his reports of 1893-1895. Claims were made of great navigable distances which would result from these expenditures. No appropriations

resulted, possibly because the fears of Captain Mellon, quoted in the report of 1894 (p. 58), were realized. He said:

> "Having associated with the U. S. engineers for a period of two years, while they were at work on the river, (this refers to work done under the appropriation of 1884) and knowing in consequence their disposition, I am quite sure that they will not recommend any work being done on this river, as the surroundings are too lonesome for them, but should an appropriation be made for this purpose they would expend it judiciously."

The later reports of Governor Murphy, referred to, abandon the request for appropriations. They repeat the old claims of navigability and hope for a return "of the old steamboating days."

Congressional and Executive Reports upon the Present Statute: These reports are referred to on pages 45 and 46 of the Wilbur brief. The first report, that of the Director of the Reclamation Service, made in February, 1922, claims, among reasons given why the development of the Colorado River is a national problem, that it is a navigable river. This assertion is made on page 1 of the report. The report with its appendices contains 233 pages. There is not another reference to the alleged navigability of the river in the entire report, nor is any fact stated which would tend to support this claim. The report of the House Committee, next referred to, states that evidence has been presented to it "which would tend toward the conclusion that the river is navigable as a matter of law." This cautious statement is not supported by any reference to the alleged evidence on which it is based. The Senate Committee report

states frankly that in its natural state the river is not susceptible for use as a highway of commerce.

Historical Works of Reference: These volumes begin with the early efforts in the '50s, '60s and '70s of the last century, before the railroads were extended to California and when overland travel by stage through desert and Indian inhabited country was difficult and dangerous, to provide transportation to and from Arizona. The first plan was devised in 1855 by Secretary of War Jefferson Davis who imported a herd of camels from Africa. This attempt to bring the East and the West together proved a failure. Supplies were then shipped by boat from San Francisco to the mouth of the Colorado, where they were unloaded. The treaties of 1848 and 1853 with Mexico did not permit overland travel between Arizona and the Gulf of California, but required that it be by river. Accordingly flat-bottomed stern wheel steamers, with great difficulty, during most of the year from low water and sand bars and during a few months from high water and driftwood, carried freight to Yuma, 96 miles from the Gulf. Under favorable conditions trips were made above Yuma, some of considerable distance, which were regarded as so extraordinary that the "indomitable energy" of those who accomplished them was the subject of legislative resolutions of commendation. When railroad communication with California was possible the unequal struggle to navigate the Colorado was soon abandoned. In 1909 the river changed its course in Mexico moving twenty miles to the west and flowing through Volcano Lake. It is described by the International Water Commission as follows:[1]

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[1] Report of American Section of International Water Commission, United States and Mexico (1930), House Doc. 359, 71st Cong., 2d Sess., page 20.

"When the Commission inspected this portion of the river's course in the spring of 1928 there was no one channel in existence and the river resembled a network of streams hardly, in most cases, large enough to deserve the ordinary appellation of creek. They were really a series of brooks. * * *"

The historical and scientific material bearing on the navigation of the Colorado is well summed up by Dr. Elwood Mead in the report of July, 1919, of the All-American Canal Board to the Secretary of the Interior (pp. 13-14):

"Until the Colorado River made its change of alignment in 1909 the navigation of the river by very light-draft boats was possible from the gulf to and beyond Yuma. The river had, however, lost importance as a navigable waterway when the railroads were built which cross the stream at Yuma and at Needles. Navigation at its best was carried on under difficulties. The river flows in a broad bed with a bottom of fine sand. The width of the stream between banks in straight reaches is generally 600 to 900 feet. In bends and where there is much bank cutting the width is occasionally half a mile or more. At low water there was scant depth and at high water the swift current and large amount of drift added to the difficulties of navigation. At present the ascent of the river by boat from the Gulf of California is understood to be not practical at any stage of the river, owing to the fact that there is no continuous main channel through the Volcano Lake region, where the river spreads its water over a broad area. * * * The construction of the Laguna Dam, authorized by an act of Congress in 1904 which gave the Secretary of the Interior the right to divert water from the river for the Yuma

project, has interposed a barrier to navigation about 12 miles above Yuma and may be accepted as an indication that the United States regards the navigability of the Colorado River as of no importance. The utilization of the river's waters for irrigation far outweighs any possible utilization thereof for navigation. The most recent examination of the Colorado River, with a view to developing and improving navigation was made by Maj. R. R. Raymond, of the Corps of Engineers, United States Army. His report bears date of May 21, 1914, and has been published as House Document No. 1141 of the Sixty-third Congress, second session. Maj. Raymond, in this report, after referring to the fact that the navigability of the Colorado River has been the subject of preliminary examination several times, states that with the information contained in the reports which he enumerates and that found in other records it was not necessary to make an extensive reconnaissance of the river. He visited the river, however and says:

"'Below Yuma the river flows through a delta country which is constantly being built up by the large quantity of silt carried by the river. The channel is unstable and can not be made stable at reasonable cost. At present the principle channel in Mexico passes through Volcano Lake. In addition to the fact that this part of the river lies in a foreign country, it should be noted that there is so little water available in the river below the heading of the Imperial Canal during low stages that navigation throughout the year is impracticable. The amount of water extracted from the river for irrigation will increase rather than decrease.'

"After referring to the fact that the growth of commerce along the river would imply an increase of the demand for irrigation waters, Maj. Raymond concludes that—'the improvement of

the Colorado River for navigation would defeat its own ends and would be a detriment to the adjacent country, except possibly that flood control would be beneficial.'

"He finds the situation such that he does not even recommend a survey of the river, and says:

"'Attention is invited to the conclusion reached by officers who have examined this river heretofore, which agrees with my own. The development of the country by irrigation in recent years makes the improvement even less desirable today than it was formerly.'"

And in "Mormon Settlement in Arizona", (1921), cited by the Wilbur brief, the author says (p. 112):

"The Colorado now absolutely has lost all possibilities for commerce. Pioneer conditions are about the same as far southward as the Laguna dam. This structure, built to divert water for the Yuma and Imperial valleys, absolutely bars the river channel for navigation. Above it and below it now are only ferries and a few power boats. The great Imperial canal system, at a point below Yuma, for much of the year drains the river flow. Where good-sized steamers once plied from tidewater, at the head of the Gulf of California, now, for months at a time, is only a dry sand wash. To this extent the advance of civilization has obliterated a river that ranks, in geography at least, among the greatest streams of the United States."

Mr. Herbert Hoover, in making his report to Congress upon the Colorado River Compact, said (67th Cong., 4th Sess., House Doc. 605, pp. 3-4):

"* * * While there is an occasional period of high water when navigation may be physically possible, this would continue for only a few months in ordinary years. There is no commercial navigation upon the river at present."

In *Oklahoma v. Texas*, 258 U. S. 574, this Court held insufficient to warrant a finding of navigability evidence which is strikingly parallel to that just mentioned. In that case the Court was concerned with the Red River on the boundary between Oklahoma and Texas. The very names of the rivers indicate elements of similarity. We are here concerned with the Colorado (Reddish) River of the West. In that case, as in this, permission had been asked of Congress, and granted by it, to construct bridges over the river. These requests for authority indicated, as this Court said (p. 586), mere prudence on the part of those constructing the bridges, and the qualification attached to the grant of authority was "only precautionary and not intended as an affirmation of navigable capacity." In that case Congress had expended $500,000 to improve the river, and had then abandoned the attempt, upon the recommendation of Army engineers that it was not likely to result in any commercial navigation and that the small (high-water) commerce of an earlier period had disappeared (p. 590). In this case it appears that 47 years ago Congress authorized an expenditure of $25,000, and then abandoned the attempt to make the river navigable upon the similar recommendations of Army engineers.

In that case the Court was given statements found in early publications and repeated in later ones to the effect that the river was navigable for great dis-

tances.[1] The Court referred to these publications in language pertinent to similar publications referred to in Appendix A and already summarized. It said (p. 586):

> "* * * These statements originated at a time when there were no reliable data on the subject, and were subsequently accepted and repeated without much concern for their accuracy. Of course, they and their repetition must yield to the actual situation as learned in recent years. The evidence also discloses an occasional tendency to emphasize the exceptional conditions in times of temporary high water and to disregard the ordinary conditions prevailing throughout the greater part of the year. * * *"

In that case the date and history of the early navigation relied upon in the area under consideration by the Court was substantially identical with the early navigation shown by Appendix A upon the entire Colorado. The Court summarizes it on page 589:

> "Lanesport, Arkansas, which is near the Oklahoma boundary, has been the usual head of navigation; but for several years before railroads were extended into that section boats of light draft carried merchandise up the river to

[1] In this connection it is interesting to note that the Wilbur brief on page 44 refers to the New International Encyclopedia as an authority for the navigability of the Colorado River. This work of reference is also an authority for the navigability of the Red River in the area in which this court held that it was not navigable. After stating that the Red River has a length of 1045 miles the Encyclopedia in Vol. 19, page 622, says:

> "It has a navigable length of about 1250 miles, and its tributaries, chief of which is the Washita, afford in addition 2100 miles of navigable waterways. * * *"

The Encyclopedia Britannica makes no statement that the Colorado River is or ever was navigable. See Vol. 6, pp. 49, 50.

> the mouth of the Kiamitia (83 miles up stream from the eastern boundary of Oklahoma) and other points in that vicinity and took out cotton and other products on the return trip. This occurred only in periods of high water, and was accomplished under difficulties. In very exceptional instances boats went to the mouth of the Washita, (217 miles up stream from the eastern boundary of Oklahoma) where some had to await the high water of the next season before they could return. When the railroads were constructed this high-water or flood navigation ceased. That was between 1875 and 1880."

In this case, before the railroads were extended to California, navigation under great difficulties is shown to have taken place 96 miles up the Colorado from the Gulf of Mexico, and under exceptional circumstances for some distances further. When railroads were built this navigation, like Jefferson Davis' camels, became a tradition.

In that case the Court found (p. 590) from witnesses who had had long knowledge of the river that,

> "the depth of the water at ordinary stages has come to be less than it was from 1850 to 1870, when they first knew it. Portions of the banks have been swept away and sand in great quantities has been brought down stream, making the river wider and shallower than at the time of the navigation just mentioned."

In the present case it is shown that, since the time when the river was navigated, one-half of the water then flowing in it has been diverted and is consumed in irrigation.

The physical condition of the two rivers is so strik-

ingly similar that the Court's description of the Red River could stand without change as a description of the Colorado. Both rivers flow through country where the rain fall is light and is confined to a relatively short period of the year, so that neither has a dependable body of water. (p. 587) Both have a fall of from one to three feet per mile. (pp. 587, 589) The Red River has a width in places of 1,000 feet (p. 588); the width of the Colorado varies from 600 to 900 feet. The bed of the Red River "consists of light sand which is easily washed about and is carried down stream in great quantities at every rise of the water." (p. 589) The Colorado River "flows in a broad bed with a bottom of fine sand." The Red River is shallow, from 18 inches to 3 feet deep, is blocked by shifting and extensive sand bars, and its channel shifts from one side of the river bed to the other. (pp. 587-589) In the Colorado, "at low water there is scant depth"; it, too, is obstructed by numerous sand bars (Bill, 7); and its "channel is not stable and can not be made stable at reasonable cost."

Summing up all the evidence, the Court said of the Red River what, if the material contained in Appendix A of the Wilbur brief were before it, it must say of the Colorado (p. 591):

> "* * * it is neither used, nor susceptible of being used, in its natural and ordinary condition as a highway for commerce. Its characteristics are such that its use for transportation has been and must be exceptional, and confined to the irregular and short periods of temporary high water. A greater capacity for practical and beneficial use in commerce is essential to establish navigability."

SUPREME COURT OF THE UNITED STATES.

No. 19, Original.—October Term, 1930.

State of Arizona,
vs.
State of California, et al.

[May 18, 1931.]

Mr. Justice Brandeis delivered the opinion of the Court.

The Boulder Canyon Project Act, December 21, 1928, c. 42, 45 Stat. 1057, authorizes the Secretary of the Interior, at the expense of the United States, to construct at Black Canyon on the Colorado River, a dam, a storage reservoir, and a hydroelectric plant; provides for their control, management, and operation by the United States; and declares that the authority is conferred "subject to the terms of the Colorado River compact," "for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking."

The Colorado River Compact is an agreement for the apportionment of the water of the river and its tributaries. After several years of preliminary informal discussion, Colorado, Wyoming, Utah, New Mexico, Arizona, Nevada, and California—the seven States through which the river system extends—appointed commissioners in 1921 to formulate an agreement; and Congress, upon request, gave its assent, and authorized the appointment of a representative to act for the United States. Act of August 19, 1921, c. 72, 42 Stat. 171. On November 24, 1922, these commissioners and the federal representative signed an agreement to become effective when ratified by Congress and the legislatures of all of these States. The Boulder Canyon Project Act approved

this agreement subject to certain limitations and conditions, the approval to become effective upon the ratification of the compact, as so modified, by the legislatures of California and at least five of the six other States. The legislatures of all these States except Arizona ratified the modified compact and the Act was accordingly declared to be in effect. Proclamation of June 25, 1929, 46 Stat. 20.

On October 13, 1930, Arizona filed this original bill of complaint against Ray Lyman Wilbur, Secretary of the Interior, and the States of California, Nevada, Utah, New Mexico, Colorado and Wyoming. It charges that Wilbur is proceeding in violation of the laws of Arizona to invade its quasi-sovereign rights by building at Black Canyon on the Colorado River a dam, half of which is to be in Arizona, and a reservoir to store all the water of the river flowing above it in Arizona, for the purpose of diverting part of these waters from Arizona for consumptive use elsewhere, and of preventing the beneficial consumptive use in Arizona of the unappropriated water of the river now flowing in that State; that these things are being done under color of authority of the Boulder Canyon Project Act; that this Act purports to authorize the construction of the dam and reservoir, the diversion of the water from Arizona, and its perpetual use elsewhere; that the Act directs and requires Wilbur to permit no use or future appropriation of the unappropriated water of the main stream of the Colorado River, now flowing in Arizona and to be stored by the said dam and reservoir, except subject to the conditions and reservations contained in the Colorado River Compact; and that the Act thus attempts to enforce as against Arizona, and to its irreparable injury, the compact which it has refused to ratify. The bill prays that the compact and the Act "and each and every part thereof, be decreed to be unconstitutional, void and of no effect; that the defendants and each of them be permanently enjoined and restrained from enforcing or carrying out said compact or said act, or any of the provisions thereof, and from carrying out the three pretended contracts hereinabove referred to, or any of them, or any of their provisions, [meaning certain contracts executed by Wilbur on behalf of the United States for the use of the stored water and developed power after the project shall have been completed] and from doing any other act or thing pursuant to or under color of said Boulder Canyon Project Act."

Process was made returnable on January 12, 1931; and on that day all of the defendants moved that the bill be dismissed. The grounds assigned in the motions are (1) that the bill does not join the United States, an indispensable party; (2) that the bill does not present any case or controversy of which the Court can take judicial cognizance; (3) that the proposed action of the defendants will not invade any vested right of the plaintiff or of any of its citizens; (4) that the bill does not state facts sufficient to constitute a cause of action against any of the defendants. The case was heard on these motions.

The wrongs against which redress is sought are, first, the threatened invasion of the quasi-sovereignty of Arizona by Wilbur in building the dam and reservoir without first securing the approval of the State engineer as prescribed by its laws; and, second, the threatened invasion of Arizona's quasi-sovereign right to prohibit or to permit appropriation, under its own laws, of the unappropriated water of the Colorado River flowing within the State. The latter invasion, it is alleged, will consist in the exercise, under the Act and the compact, of a claimed superior right to store, divert, and use such water.

First. The claim that quasi-sovereign rights of Arizona will be invaded by the mere construction of the dam and reservoir rests upon the fact that both structures will be located partly within the State. At Black Canyon, the site of the dam, the middle channel of the river is the boundary between Nevada and Arizona. The latter's statutes prohibit the construction of any dam whatsoever until written approval of plans and specifications shall have been obtained from the State engineer; and the statutes declare in terms that this provision applies to dams to be erected by the United States. Arizona Laws 1929, c. 102, §§ 1-4. See also Revised Code of 1928, §§ 3280-3286. The United States has not secured such approval; nor has any application been made by Wilbur, who is proceeding to construct said dam in complete disregard of this law of Arizona.

The United States may perform its functions without conforming to the police regulations of a State. *Johnson* v. *Maryland*, 254 U. S. 51; *Hunt* v. *United States*, 278 U. S. 96. If Congress has power to authorize the construction of the dam and reservoir, Wilbur is under no obligation to submit the plans and specifications to the

State engineer for approval.[1] And the federal Government has the power to create this obstruction in the river for the purpose of improving navigation if the Colorado River is navigable. *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 18 How. 421, 430; *South Carolina* v. *Georgia*, 93 U. S. 4, 11; *Gibson* v. *United States*, 166 U. S. 269; *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 64; *Greenleaf Johnson Lumber Co.* v. *Garrison*, 237 U. S. 251, 258-68. Arizona contends both that the river is not navigable, and that it was not the purpose of Congress to improve navigation.

The bill alleges that "the river has never been, and is not now, a navigable river." The argument is that the question whether a stream is navigable is one of fact; and that hence the motion to dismiss admits the allegation that the river is not navigable. It is true that whether a stream is navigable in law depends upon whether it is navigable in fact; *United States* v. *Utah*, 283 U. S. —;[2] and that a motion to dismiss, like a demurrer, admits every well-pleaded allegation of fact, *Payne* v. *Central Pacific Ry. Co.*, 255 U. S. 228, 232. But a court may take judicial notice that a river within its jurisdiction is navigable. *United States* v. *Rio Grande Dam and Irrigation Co.*, 174 U. S. 690, 697; *Wear* v. *Kansas*, 245 U. S. 154, 158. We know judicially, from the evidence of history, that a large part of the Colorado River south of Black Canyon was formerly navigable,[3] and that the main obstacles to navigation have

[1] The further allegation that the proposed dam, reservoir, and power plants, when completed, may not be subject to the taxing power of Arizona, may be disregarded. The Act provides that the title to such works shall remain forever in the United States, and such exemption is but an ordinary incident of any public undertaking by the federal government.

[2] Compare The Daniel Ball, 10 Wall. 557, 563; The Montello, 20 Wall. 430; St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners, 168 U. S. 349; Leovy v. United States, 177 U. S. 621; Economy Light & Power Co. v. United States, 256 U. S. 113; Oklahoma v. Texas, 258 U. S. 574, 590, 591; Brewer-Elliott Oil & Gas Co. v. United States, 260 U. S. 77, 86; United States v. Holt State Bank, 270 U. S. 49, 56, 57.

[3] Navigability extended as far north as the mouth of the Virgin River at Black Canyon. See Report Upon the Colorado River of the West, H. R. Ex. Doc. No. 90, 36th Cong., 1st Sess., June 5, 1860, pts. I-II, and maps; H. R. Mis. Doc. No. 37, 42d Cong., 1st Sess., April 15, 1871; H. R. Ex. Doc. No. 18, 51st Cong., 2d Sess., December 2, 1890; H. R. Doc. No. 101, 54th Cong., 1st Sess., December 27, 1895; H. R. Doc. No. 67, 56th Cong., 2d Sess., December 5, 1900; Ann. Rep., Chief of Engineers, War Department, 1879, pp. 1773-85; Hodge, Arizona As It Is, (1877) pp. 208-10; Hinton, Handbook to Arizona,

been the accumulations of silt coming from the upper reaches of the river system, and the irregularity in the flow due to periods of low water.[4] Commercial disuse resulting from changed geographical conditions and a Congressional failure to deal with them, does not amount to an abandonment of a navigable river or prohibit future exertion of federal control. *Economy Light & Power Co.* v. *United States*, 256 U. S. 113, 118, 124. We know from the reports of the committees of the Congress which recommended the Boulder Canyon project that, in the opinion of the government engineers, the silt will be arrested by the dam; that, through use of the stored water, irregularity in its flow below Black Canyon can be largely overcome; and that navigation for considerable distances both above and below the dam will become feasible.[5] Compare *St. Anthony Falls Water Power Co.* v. *St. Paul Water Commissioners*, 168 U. S. 349, 359; *United States* v. *Cress*, 243 U. S. 316, 326.

(1878) pp. 66-67, 371-72, and maps; Freeman, The Colorado River, (1923) cc. I, V, VII, particularly pp. 146-67; Sloan, History of Arizona, (1930), vol. I, pp. 216-36.

By the Act of July 5, 1884, c. 229, 23 Stat. 133, 144, Congress appropriated $25,000 for the improvement of navigation on the Colorado River between Fort Yuma and a point thirty miles above Rioville, which was located at the mouth of the Virgin River. An additional $10,000 for a levee at Yuma was appropriated by the Act of July 22, 1892, c. 158, 27 Stat. 88, 108-09. See H. R. Doc. Nos. 204 and 237, 58th Cong., 2d Sess., December 18, 1903. As to navigability north and east of Boulder Canyon, see United States v. Utah, 283 U. S. —.

[4]See Report by Director of Reclamation Service on Problems of Imperial Valley and Vicinity, Sen. Doc. No. 142, 67th Cong., 2d Sess., February 23, 1922, pp. 3-10, 240; Report of the Colorado River Board on the Boulder Dam Project, H. R. Doc. No. 446, 70th Cong., 2d Sess., December 8, 1928, pp. 12-14; Report of the All-American Canal Board, July 22, 1919, pp. 24-38. For the geological history of the lower Colorado area, see Information Presented to the House Committee on Irrigation and Reclamation in connection with H. R. 2903, 68th Cong., 1st Sess., 1924, pp. 135-43. All the former documents on the Colorado River Development were adopted as part of the hearings on Boulder Canyon Project Act. See Hearings Before the House Committee on Irrigation and Reclamation on H. R. 5773, 70th Cong., 1st Sess., January 6, 1928, pp. 8-10.

[5]The House Committee on Irrigation and Reclamation stated that one of the purposes of the Act was to have the flow of the river below the dam "regulated and even" and thus "susceptible to use by power boats and other small craft. The great reservoir will, of course, be susceptible of navigation." See Boulder Canyon Project, H. R. Rep. 918, 70th Cong., 1st Sess., March 15,

The bill further alleges that the "recital in said act that the purpose thereof is the improvement of navigation" "is a mere subterfuge and false pretense." It quotes a passage in Art. IV of the compact, to which the Act is subject, which declares that "inasmuch as the Colorado River has ceased to be navigable for commerce and the reservation of its waters for navigation would seriously limit the development of its basin, the use of its waters for purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural, and power purposes;" and alleges that "even if said river were navigable, the diversion, sale and delivery of water therefrom, as authorized in said act, would not improve, but would destroy, its navigable capacity."[6]

Into the motives which induced members of Congress to enact the Boulder Canyon Project Act, this Court may not enquire. *McCray* v. *United States*, 195 U. S. 27, 53-59; *Weber* v. *Freed*, 239 U. S. 325, 329-30; *Wilson* v. *New*, 243 U. S. 332, 358-59; *United States* v. *Doremus*, 249 U. S. 86, 93-94; *Dakota Central Telephone* v. *South Dakota*, 250 U. S. 163, 187; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 161; *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180, 210.[7] The Act declares that the authority to con-

1928, p. 6. As to control of silt deposits, see *id.*, pp. 16-17. A similar report was made to the Senate. See Boulder Canyon Project, Sen. Rep. 592, 70th Cong., 1st Sess., March 20, 1928, pp. 5-7, 16-20. The House Committee said in summary: "The proposed dam would improve navigation probably more than any other works which could be constructed. The dam will so regulate the flow as to make the river very practicable of navigation for 200 miles below and impound water above which could easily be navigated for more than 75 miles." H. R. Rep. 918, *supra*, p. 22. Compare Hearings before the House Committee on Irrigation and Reclamation on H. R. 5773, 70th Cong., 1st Sess., pt. 3, January 13-14, 1928, pp. 340-41; Hearings Before the Senate Committee on Irrigation and Reclamation on S. 728 and S. 1274, *id.*, January 17-21, 1928, pp. 368-77, 384, 420-21. Since below Black Canyon the Colorado River is a boundary stream, such navigation will be at least partially interstate.

[6]Reliance is also had upon the fact that the bill as originally introduced contained no reference to navigation, but that the statements of this purpose, found in the Act, were inserted during the course of the hearings. See Minority Views, H. R. Rep. No. 918, 70th Cong., 1st Sess., pt. 3, pp. 14-18.

[7]Similarly, no inquiry may be made concerning the motives or wisdom of a State legislature acting within its proper powers. United States v. Des Moines Navigation & Railway Co., 142 U. S. 510, 544; Atchison, Topeka & Santa Fé R. R. Co. v. Matthews, 174 U. S. 96, 102; Calder v. Michigan, 218 U. S. 591, 598; Rast v. Van Deman & Lewis, 240 U. S. 342, 357, 366. Compare O'Gorman & Young, Inc. v. Hartford Fire Insurance Co., 282 U. S. 251, 258.

struct the dam and reservoir is conferred, among other things, for the purpose of "improving navigation and regulating the flow of the river." As the river is navigable and the means which the Act provides are not unrelated to the control of navigation, *United States* v. *River Rouge Improvement Co.*, 269 U. S. 411, 419, the erection and maintenance of such dam and reservoir are clearly within the powers conferred upon Congress. Whether the particular structures proposed are reasonably necessary, is not for this Court to determine. Compare *Fong Yue Ting* v. *United States*, 149 U. S. 698, 712-14; *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320, 340; *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 65, 72-73; *Everard's Breweries* v. *Day*, 265 U. S. 545, 559. And the fact that purposes other than navigation will also be served could not invalidate the exercise of the authority conferred, even if those other purposes would not alone have justified an exercise of Congressional power. Compare *Veazie Bank* v. *Fenno*, 8 Wall. 533, 548; *Kaukauna Water Power Co.* v. *Green Bay & Mississippi Canal Co.*, 142 U. S. 254, 275; *In re Kollock*, 165 U. S. 526, 536; *Weber* v. *Freed*, *supra*; *United States* v. *Doremus*, *supra*.

It is urged that the Court is not bound by the recital of purposes in the Act; that we should determine the purpose from its probable effect; and that the effect of the project will be to take out of the river, now non-navigable through lack of water, the last half of its remaining average flow. But the Act specifies that the dam shall be used: "First, for river regulation, improvement of navigation and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights . . . ; and third, for power." It is true that the authority conferred is stated to be "subject to the Colorado River Compact," and that instrument makes the improvement of navigation subservient to all other purposes. But the specific statement of primary purpose in the Act governs the general references to the compact. This Court may not assume that Congress had no purpose to aid navigation, and that its real intention was that the stored water shall be so used as to defeat the declared primary purpose. Moreover, unless and until the stored water, which will consist largely of flood waters now wasted, is consumed in new irrigation projects or in domestic use, substantially all of it will be available for the improvement of navigation. The possible abuse of the power to regulate navigation is

not an argument against its existence. *Lottery Case*, 188 U. S. 321, 363; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 168-69; *Wilson* v. *New*, 243 U. S. 332, 354; *Hamilton* v. *Kentucky Distilleries, supra*; *Alaska Fish Salting & By-Products Co.* v. *Smith*, 255 U. S. 44, 48.

Since the grant of authority to build the dam and reservoir is valid as an exercise of the Constitutional power to improve navigation, we have no occasion to decide whether the authority to construct the dam and reservoir might not also have been constitutionally conferred for the specified purpose of irrigating public lands of the United States.[8] Compare *United States* v. *Rio Grande Dam and Navigation Co.*, 174 U. S. 690, 703; *United States* v. *Alford*, 274 U. S. 264. Or for the specified purpose of regulating the flow and preventing floods in this interstate river.[9] Or as a means of conserving and apportioning its waters among the States equitably entitled thereto. Or for purpose of performing international obligations.[10] Compare *Missouri* v. *Holland*, 252 U. S. 416.

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[8] "A large part of the land through which the Colorado River flows, or which is adjacent or tributary to it, is public domain of which the United States is the proprietor." Colorado River Compact, H. R. Doc. No. 605, 67th Cong., 4th Sess., March 2, 1923, p. 6. As to extent of this land and irrigation projects on it in connection with the Boulder Canyon Dam, see Report of the Director of the Reclamation Service on Problems of Imperial Valley and Vicinity, Sen. Doc. No. 142, 67th Cong., 2d Sess., February 23, 1922, appendices C-D. See also Department of Interior, Twenty-fifth Ann. Rep. Bureau of Reclamation (1926), pp. 2-29; Vacant Public Lands on July 1, 1929, Department of Interior, General Land Office, Circular No. 1197, pp. 3-10; Report of the International Water Commission, H. R. Doc. No. 359, 71st Cong., 2d Sess., April 21, 1930, pp. 93-177, and Bibliography, p. 97.

[9] Compare the legislation for Mississippi river flood control, independent of navigation improvements. Joint Resolution of May 2, 1928, c. 175, 45 Stat. 504; Act of September 22, 1922, c. 427, § 13, 42 Stat. 1038, 1047; Act of December 22, 1927, c. 5, 45 Stat. 2, 38; and particularly Act of May 15, 1928, c. 569, 45 Stat. 534.

[10] The Colorado River and its tributaries have frequently been the subject of treaties between the United States and Mexico. See Treaty of Guadalupe Hidalgo, February 2, 1848, Art. VII, in Malloy, United States Treaties, vol. I, pp. 1107, 1111; Gadsden Treaty, December 30, 1853, Art. IV, *id.*, pp. 1121, 1123; Boundary Convention of March 1, 1889, Arts. I, V, *id.*, pp. 1167-92. Compare the 1912 proposals reported in Hearings Before the House Committee on the Irrigation of Arid Lands, 66th Cong., 1st Sess., July 9-14, 1919, Append., pp. 323-26. As to Rio Grande River, see Convention of May 21, 1906, Treaty Series No. 455; 31 Opp. Atty. Gen. 274, 282, 518; Sen. Doc. No. 154, 57th Cong., 2d Sess., February 14, 1903. For the international aspects of the proposed Colorado River Development, see Hearings Before

Second. The further claim is that the mere existence of the Act will invade quasi-sovereign rights of Arizona by preventing the State from exercising its right to prohibit or permit under its own laws the appropriation of unappropriated waters flowing within or on its borders. The opportunity and need for further appropriations are fully set forth in the bill. Arizona is arid and irrigation is necessary for cultivation of additional land. The future growth and welfare of the State are largely dependent upon such reclamation. It is alleged that there are within Arizona 2,000,000 acres not now irrigated which are susceptible of irrigation by further appropriations from the Colorado River.[11] To appropriate water means to take and divert a specified quantity thereof and put it to beneficial use in accordance with the laws of the State where such water is found, and, by so doing, to acquire under such laws, a vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever, subject only to the right of prior appropriations. Under the law of Arizona, the perfected vested right to appropriate water flowing within the State cannot be acquired without the performance of physical acts through which the water is and will in fact be diverted to beneficial use. Topographical conditions make it necessary that land in the State be irrigated in large projects. The Colorado River flows, both on the boundary between Arizona and Nevada, and in Arizona alone, through an almost continuous series of deep canyons, the walls of which rise in Arizona to a height varying from a few hundred to more than 5000 feet. The cost of installing the dams, reservoirs, canals, and distribution works required to effect any diversion, will be very heavy; and financing on a large scale is indispensable. Such financing will be impossible

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the House Committee on Irrigation of Arid Lands, 66th Cong., 1st Sess., July 9-14, 1919, Append., pp. 323-48; Colorado River Compact, H. R. Doc. No. 605, 67th Cong., 4th Sess., March 2, 1923, pp. 5-6; Report of the All-American Canal Board, July 22, 1919, pp. 14-15; Report of International Water Commission, *supra* Note 8, pp. 17-23, 85-282.

[11] Of the total length of 1,293 miles of the Colorado River, 688 miles are within or on the boundaries of Arizona. After leaving Utah, the main river flows for 292 miles wholly in Arizona. Then, the middle of the channel forms the boundary between Arizona and Nevada for 145 miles; and for 235 miles, the boundary between Arizona and California. Tributaries of the river flow within Arizona for a combined length of 836 miles, and most of these enter the main stream below Black Canyon.

unless it clearly appears that, at or prior to the time of constructing such works, vested rights to the permanent use of the water will be acquired.

The alleged interference with the right of the State to control additional appropriations is based upon the following facts. The average annual flow of the Colorado River system, including the tributaries, is 18,000,000 acre-feet.[12] Only 9,000,000 acre-feet have been appropriated by Arizona and the defendant States. Of this 3,500,000 acre-feet have been appropriated in Arizona under its laws, and the remaining 5,500,000 acre-feet by the other States. The 9,000,000 acre-feet unappropriated are now subject to appropriation in Arizona under its laws. It is alleged that there are numerous sites suitable for the construction, maintenance, and operation of dams and reservoirs required for the irrigation of land in Arizona; and that actual projects have been planned for the irrigation of 1,000,000 acres, including 100,000 acres owned by the State. For this purpose 4,500,000 acre-feet annually will be additionally required. Permits to appropriate this water have been granted by the State; and definite plans to carry out projects for the building of dams on that part of the river flowing in or on the borders of Arizona have been approved by the State engineer. It is stated that but for the passage of the Boulder Canyon Project Act, construction work would long since have commenced.

It is conceded that the continued use of the 3,500,000 acre-feet of water already appropriated in Arizona is not now threatened. And there is no allegation that at the present time the enjoyment of these rights is being interfered with in any way. The claim strenuously urged is that the existence of the Act, and the threatened exercise of the authority to use the stored water pursuant to its terms, will prevent Arizona from exercising its right to control the making of further appropriations. It is argued that such needed additional appropriations will be prevented because Wilbur proposes to store the entire unappropriated flow of the main stream of the Colorado River at the dam; that Arizona, and those claiming under it, will not be permitted to take any water from the reservoir except upon agreeing that the use shall be subject to the compact; that under the terms of the com-

[12] An acre-foot is the quantity of water required to cover an acre to a depth of one foot—43,560 cubic feet. See Wyoming *v.* Colorado, 259 U. S. 419, 458.

pact they will not be entitled to appropriate any water in excess of that to which there are now perfected rights in Arizona;[18] and that in order to irrigate land in Arizona it is frequently necessary to utilize rights of way over lands of the United States, and since the Act provides that all such rights of way or other privileges to be granted by the United States shall be upon the express condition and with the express covenant that they shall be subject to the compact, the Act in effect prevents Arizona and those claiming under it from acquiring such rights.

This contention cannot prevail because it is based not on any actual or threatened impairment of Arizona's rights but upon assumed potential invasions. The Act does not purport to affect any legal right of the State, or to limit in any way the exercise of its legal right to appropriate any of the unappropriated 9,000,000 acre-feet which may flow within or on its borders. On the contrary, section 18 specifically declares that nothing therein "shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation,

[18]The allegation is in substance this. Of the average annual flow of 18,000,000 acre-feet, the Act and compact permit the present final appropriation of only 15,000,000. This quantity must satisfy all existing appropriations as well as all future appropriations. Of these 15,000,000, one-half is apportioned to the so-called Upper Basin, which includes Utah, Colorado, Wyoming, and New Mexico. The remaining 7,500,000 acre-feet have been allotted to the so-called Lower Basin, which includes Arizona and parts of Nevada and California. Of the water thus allotted to the lower basin, 6,500,000 acre-feet have already been appropriated; and, under a contract made by Wilbur with the Metropolitan Water District of Southern California, the remaining 1,000,000 are to be diverted to it. Thus it is argued that consistently with the Act and compact, it will be impossible for Arizona to make any further appropriation, unless it be under the following provision. The compact provides that no part of the 8,000,000 acre-feet of the estimated annual flow, not now apportioned, shall be appropriated until after October 1, 1963, as such water may be required to satisfy rights of Mexico, through which country the river flows after leaving the United States. If the satisfaction of recognized Mexican rights reduces the unappropriated water below 1,000,000 acre-feet annually, the lower basin States may require the upper basin States to deliver from their apportionment, one-half of the amount required to meet the deficit. It is claimed that Arizona thus may use, but not legally appropriate, any unappropriated water which is available for use by it; and that this restricted right does not justify the expenditures necessary for putting the water to beneficial use in Arizona.

control, and use of water within their borders, except as modified" by interstate agreement. As Arizona has made no such agreement, the Act leaves its legal rights unimpaired. There is no allegation of definite physical acts by which Wilbur is interfering, or will interfere, with the exercise by Arizona of its right to make further appropriations by means of diversions above the dam or with the enjoyment of water so appropriated.[14] Nor any specific allegation of physical acts impeding the exercise of its right to make future appropriations by means of diversions below the dam, or limiting the enjoyment of rights so acquired, unless it be by preventing an adequate quantity of water from flowing in the river at any necessary point of diversion.

When the bill was filed, the construction of the dam and reservoir had not been commenced. Years must elapse before the project is completed. If by operations at the dam any then perfected right of Arizona, or of those claiming under it, should hereafter be interfered with, appropriate remedies will be available. Compare *Kansas* v. *Colorado*, 206 U. S. 46, 117. The bill alleges, that plans have been drawn and permits granted for the taking of additional water in Arizona pursuant to its laws. But Wilbur threatens no physical interference with these projects; and the Act interposes no legal inhibitions on their execution.[15] There is no

[14]There is in the bill a further allegation that, under color of the Act, Wilbur has seized and taken possession of all that part of the Colorado River which flows in Arizona and on the boundary thereof, and of the water now flowing therein, and of all the dam sites and reservoir sites suitable for irrigation of the Arizona land and for the generation of electric power "and now has said river, said water and said sites in his possession; and has excluded and is now excluding the State of Arizona, its citizens, inhabitants, and property owners from said river, said water and said sites, and from all access thereto; has prevented and is now preventing said State, its citizens, inhabitants and property owners from appropriating any of said 8,000,000 acre-feet of unappropriated water . . ." But from other parts of the bill and from the argument, it is clear that there has been no physical taking of possession of anything, and that Wilbur has not trespassed on lands belonging either to Arizona or any of its citizens. This allegation is thus merely a conclusion of law from the fact that Wilbur, in conformity with the provisions of the Act, has made plans for the construction of the dam and reservoir, promulgated regulations concerning the use of the water to be stored, and executed contracts for the use of some of it.

[15]It is also argued that of the 7,500,000 acre-feet allotted by the compact to the upper basin States, only 2,500,000 have already been appropriated, and that thus the presently unused surplus of 5,000,000 acre-feet cannot be ap-

occasion for determining now Arizona's rights to interstate or local waters which have not yet been, and which may never be, appropriated. *New Jersey* v. *Sargent*, 269 U. S. 328, 338. This Court cannot issue declaratory decrees. Compare *Texas* v. *Interstate Commerce Commission*, 258 U. S. 158, 162; *Liberty Warehouse* v. *Grannis*, 273 U. S. 70, 74; *Willing* v. *Chicago Auditorium Association*, 277 U. S. 274, 289-90. Arizona has, of course, no legal right to use, in aid of appropriation, any land of the United States, and it cannot complain of the provision conditioning the use of such public land. Compare *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 403-05.

As we hold that the grant of authority to construct the dam and reservoir is a valid exercise of Congressional power, that the Boulder Canyon Project Act does not purport to abridge the right of Arizona to make, or permit, additional appropriations of water flowing within the State or on its boundaries, and that there is now no threat by Wilbur, or any of the defendant States, to do any act which will interfere with the enjoyment of any present or future appropriation, we have no occasion to consider other questions which have been argued. The bill is dismissed without prejudice to an application for relief in case the stored water is used in such a way as to interfere with the enjoyment by Arizona, or those claiming under it, of any rights already perfected or with the right of Arizona to make additional legal appropriations and to enjoy the same.

Bill dismissed.

Mr. Justice McReynolds is of the opinion that the motions to dismiss should be overruled and the defendants required to answer.

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propriated in Arizona. But Arizona is not bound by the compact as it has withheld ratification. If and when withdrawals pursuant to the compact by the upper basin States diminish the amount of water actually available for use in Arizona, appropriate action may then be brought.

The allegation that the inclusion in the compact of the waters of the Gila River (all of which are said to have been appropriated in Arizona) operates to reduce the amount of water which may be taken by that State, can likewise be disregarded. Not being bound by the compact, Arizona has not assented to this inclusion of the Gila appropriations in the allotment to the lower basin; and there is no allegation that Wilbur or any of the defendant States are interfering with perfected rights to the waters of that river, which enters the Colorado 286 miles below Black Canyon.